No. 06-1329

FILED
MAY 1 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARTHA JANE CLINE, Executrix of the Estate of Jackie Edward Cline,

Petitioner,

v.

ASHLAND, INC.; CHEVRON PHILLIPS CHEMICAL LP, successor in interest to CHEVRON CHEMICAL COMPANY, LLC; and EXXON MOBIL CORPORATION,

Respondents.

On Petition For A Writ Of *Certiorari* To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE M. WALKER
Counsel of Record

HAND ARENDALL, L.L.C.
Post Office Box 123
Mobile, Alabama 36601
Phone: (251) 432-5511

LOUIS C. WOOLF

WOOLF, MCLANE, BRIGHT, ALLEN & CARPENTER
Post Office Box 900
Knoxville, Tennessee 37901-0900
Phone: (615) 215-1000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE

In accordance with Supreme Court Rule 29.6, Respondents disclose the following:

1. Ashland, Inc., is a corporation whose stock is publicly traded. It does not have a parent corporation. No publicly held company owns 10% or more of the stock of Ashland, Inc.

2. Exxon Mobil Corporation is a corporation whose stock is publicly traded. It does not have a parent corporation. No publicly held company owns 10% or more of the stock of Exxon Mobil Corporation.

3. Chevron Phillips Chemical Company is a joint venture owned by Chevron Corporation and ConocoPhillips, each of which is a publicly traded company.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PERCEIVED MISSTATEMENTS OF FACT OR LAW	1
ADDITIONAL JURISDICTIONAL FACTS	1
REASONS FOR DENYING THE WRIT	5
I. THIS COURT LACKS JURISDICTION	5
A. The Supreme Court of Alabama did not decide the federal constitutional issue that is presented by the petition	6
B. The Supreme Court of Alabama did not have jurisdiction itself to decide the federal constitutional issue that is presented by the petition	12
C. The decision of the Supreme Court of Alabama was based on adequate and independent state law grounds	14
II. THERE IS NO COMPELLING REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW THIS CASE	16
A. Decedent was not deprived of his cause of action	16
B. There is no substantial federal question presented	18
C. None of the considerations set out in Supreme Court Rule 10 is present in this case	20

TABLE OF CONTENTS – Continued

Page

1. There is no conflict between the no opinion affirmance of the Supreme Court of Alabama and the decision of any other state court of last resort or any United States court of appeal 21

   (a) State decisions 21

   (b) Federal decisions 23

2. The no opinion affirmance of the Supreme Court of Alabama did not decide an important question of federal law that has not been decided by this Court..... 26

3. The no opinion affirmance of the Supreme Court of Alabama was not decided in a way that conflicts with relevant decisions of this Court..... 27

D. There is no manifest injustice resulting from the decision of the Supreme Court of Alabama..... 28

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) ..... *passim*

Alabama Power Co. v. Turner, 575 So. 2d 551 (Ala. 1991) 12

Alexander v. Beech Aircraft Corp., 952 F.2d 1215 (10th Cir. 1991) 26, 29

American Mut. Liab. Ins. Co. v. Phillips, 491 So. 2d 904 (Ala. 1986) 16, 29

Anderson v. Wagner, 402 N.E.2d 560 (Ill. 1979) 19

Armstrong v. Life Ins. Co. of Virginia, 454 So. 2d 1377 (Ala. 1984) 16

Becton v. Rhone-Poulenc, Inc., 706 So. 2d 1134 (Ala. 1997) 16

Bell v. Wolfish, 441 U.S. 520 (1979) 13

Board of Regents of University of State of New York v. Tomanio, 446 U.S. 478 (1980) 27

Boyce v. Cassese, 941 So. 2d 932 (Ala. 2006) 29

Brackin v. Trimmier Law Firm, 897 So. 2d 207 (Ala. 2004) 13

Branson v. O.F. Mossberg & Sons, Inc., 221 F.3d 1064 (8th Cir. 2000) 25

Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984) 25

Bunker v. Nat'l Gypsum Co., 441 N.E.2d 8 (Ind. 1982), *cert. denied*, 460 U.S. 1076 (1983) 19, 21

TABLE OF AUTHORITIES – Continued

Page

Bunker v. Nat'l Gypsum Co., 460 U.S. 1076 (1983)..... 19

Campbell v. Alabama Power Co., 567 So. 2d 1222 (Ala. 1990)..... 12

Campbell v. Louisiana, 523 U.S. 392 (1998)..... 7

Cardinale v. Louisiana, 394 U.S. 437 (1969)..... 9

Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548 (3rd Cir. 1986)..... 24

City of Mobile v. Gulf Dev., 171 So. 2d 247 (Ala. 1965).....11

Clark v. Gulesian, 400 U.S. 993 (1971)..... 19

Clark v. Gulesian, 429 F.2d 405 (1st Cir. 1970), *cert. denied*, 400 U.S. 993 (1971).....19, 24

Coleman v. Thompson, 501 U.S. 722 (1991).....14, 15

Continental Eagle Corp. v. Mokrzycki, 611 So. 2d 313 (Ala. 1992)..... 12

Courtaulds Fibers, Inc. v. Long, 779 So. 2d 198 (Ala. 2000)..... 13

Cuyahoga River Power Co. v. Northern Realty Co., 244 U.S. 300 (1917).....11

DeVenney v. Hill, 918 So. 2d 106 (Ala. 2005)..... 15

Dincher v. Marlin Fire Arms Co., 198 F.2d 821 (2nd Cir. 1952)..... 24

Dinh v. Rust Int'l Corp., 974 F.2d 500 (4th Cir. 1992)..... 25

Dunn v. Felt, 379 A.2d 1140 (Del. Super. 1977)..... 22

Eaton v. Jarvis Prods. Corp., 965 F.2d 922 (10th Cir. 1992)..... 26

TABLE OF AUTHORITIES – Continued

Page

Eddings v. Volkswagenwerk, A.G., 835 F.2d 1369 (11th Cir. 1988) 20, 26

Ellerbe v. Otis Elevator Co., 459 U.S. 802, *reh. denied*, 459 U.S. 1059 (1982) 19, 27

Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App. 1981) 19

Eustis v. Bolles, 150 U.S. 361 (1893) 14

Ex parte St. Vincent's Hospital, 652 So. 2d 225 (Ala. 1994) 12

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 10

Fields v. Legacy Health System, 413 F. 3d 943 (9th Cir. 2005) 26

Fuller v. Oregon, 417 U.S. 40 (1974) 7

Garrett v. Raytheon Co., Inc., 368 So. 2d 516 (Ala. 1979) 16, 17, 29

Griffin v. Ford Motor Co., 488 U.S. 822 (1988) 20, 26

Harris v. Black Clawson Co., 961 F.2d 547 (5th Cir. 1992) 25

Harris v. Reed, 489 U.S. 255 (1989) 15

Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362 (6th Cir. 1984) 25

Heath v. Alabama, 474 U.S. 82 (1985) 6

Hicks v. Miranda, 422 U.S. 332 (1975) 18

Hillis v. Rentokil, Inc., 596 So. 2d 888 (Ala. 1992) 16

Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001) 1, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Home Ins. Co. v. Stuart-McCorkle, Inc., 285 So. 2d 468 (Ala. 1973) 16, 17

Hubbard v. Liberty Mut. Ins. Co., 599 So. 2d 20 (Ala. 1992) 16

Illinois v. Gates, 462 U.S. 213 (1983) 6

Johnson v. Garlock, Inc., 682 So. 2d 25 (Ala. 1996) 16

Knetsch v. United States, 364 U.S. 361 (1970) 13

Lambrix v. Singletary, 520 U.S. 518 (1997) 14

Landers v. O'Neal Steel, Inc., 564 So. 2d 925 (Ala. 1990) 12

Landgraff v. Wagner, 546 P.2d 26 (Ariz. App. 1976) 22

Langley v. Mut. Fire, Marine and Inland Ins. Co., 512 So. 2d 752 (Ala. 1987) 16

Laster, Jr. ex rel. Laster, Sr. v. Norfolk Ry. Co., Inc., 2007 WL 30073 (Ala. 2007) 15

Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968) 21, 22

Liberty Nat'l Life Ins. Co. v. Univ. of Ala. Hlth. Svcs. Found., 881 So. 2d 1013 (Ala. 2003) 5

Lourdes High School v. Sheffield Brick & Tile Co., 870 F.2d 443 (8th Cir. 1989) 25

Lynch v. New York, 293 U.S. 52 (1934) 6, 10

Mathis v. Eli Lilly & Co., 719 F.2d 134 (6th Cir. 1983) 24

Matter of Anonymous, 515 So. 2d 1254 (Ala. Civ. App. 1987) 11

Michigan v. Long, 463 U.S. 1032 (1983) 14, 15

TABLE OF AUTHORITIES – Continued

Page

Mobile Airport Auth. v. HealthStrategies, Inc., 886 So. 2d 773 (Ala. 2004) 15

Moon v. Harco Drugs, Inc., 435 So. 2d 218 (Ala. 1983) 29

Munn v. Illinois, 94 U.S. 113 (1877) 28

Nat'l Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) 13

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 8

Norwest Bank v. W.R. Grace & Co., 960 F.2d 754 (8th Cir. 1998) 25

Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1959) 18

Order of R.R. Telegraphers v. Ry. Exp. Agency, 321 U.S. 342 (1944) 29

Owen v. Wilson, 537 S.W.2d 543 (Ark. 1976) 21, 22

Payton v. Monsanto Co., 802 So. 2d 829 (Ala. 2001) 29

Pittman v. United States, 341 F.2d 739 (9th Cir. 1965) 25

Pitts v. GAF Corp., 464 U.S. 1003 (1983) 1, 19

Pitts v. Unarco Indus., Inc., 712 F.2d 276 (7th Cir. 1983) 20

Railroad Co. v. Rock, 71 U.S. 177 (1866) 7

Ramey v. Guyton, 394 So. 2d 2 (Ala. 1980) 29

Silver v. Silver, 280 U.S. 117 (1929) 28

State ex rel. Baxley v. Johnson, 300 So. 2d 106 (Ala. 1974) 13

TABLE OF AUTHORITIES – Continued

Page

Street v. New York, 394 U.S. 576 (1969) 7

Terry v. Anderson, 95 U.S. 628 (1877) 18, 21, 23

Thomas v. BSE Indus. Contractors, Inc., 624 So. 2d 1041 (Ala. 1993) 1

Travis v. Ziter, 681 So. 2d 1348 (Ala. 1996) 29

Tyson v. Johns-Manville Sales Corp., 399 So. 2d 263 (Ala. 1981) 16

United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981) 13

United States v. Kubrick, 444 U.S. 111 (1979) 28, 29

Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1982) 25

Village of North Atlanta v. Cook, 133 S.E.2d 585 (Ga. 1963) 13

Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U.S. 293 (1891) 6

Wayne v. Tennessee Valley Auth., 469 U.S. 1159 (1985) 20

Wayne v. Tennessee Valley Authority, 730 F.2d 392 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) ..20, 25

Webb v. Webb, 451 U.S. 493 (1981) 8, 9, 14

Williams v. Kaiser, 323 U.S. 471 (1945) 5

Woodward v. Burnham City Hospital, 449 U.S. 807 (1980) 18, 27

Yee v. Escondido, 503 U.S. 519 (1992) 6, 10

TABLE OF AUTHORITIES – Continued

Page

RULES

Alabama Rules of Appellate Procedure, Rule 53(d) 11

Alabama Rules of Appellate Procedure, Rule 44 4

Alabama Rules of Appellate Procedure, Rule 53(a)(2)(F) 11

Alabama Rules of Civil Procedure, Rule 53 15

United States Supreme Court, Rule 10 20

United States Supreme Court, Rule 15.2 1

United States Supreme Court, Rule 29.6 i

STATUTES

28 U.S.C. § 1257 6

ALA. CODE § 6-2-30(a) (1975) 5

ALA. CODE § 6-2-38(a) (1975) 5

ALA. CODE § 6-5-38(l) (1975) 3

ALA. CODE § 6-6-227 (1975) 3, 4

ALA. CODE § 7-2-725 (1975) 3

OTHER AUTHORITIES

3B C.J.S. *Amicus Curiae* § 18 13

Charles A. Wright & Miller, 16B Fed. Prac. & Proc. Juris. 2d § 4022 6

United States Constitution, Fourteenth Amendment 5, 20

PERCEIVED MISSTATEMENTS OF FACT OR LAW

Pursuant to Supreme Court Rule 15.2, Respondents suggest that the following misstatements of fact or law appear in the petition:

1. The "manifest, present injury" rule is not an "ancient" rule in Alabama. *See* Pet. at 5. To the contrary, that phrase was first used by the Supreme Court of Alabama in *Hinton v. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001), a case in which plaintiffs sought medical monitoring costs while disavowing any present injury or illness. None of the five cases that *Hinton* cited as support for its reference to a "manifest, present injury" rule was actually a personal injury case, and each of those five decisions was issued after 1995.

2. *Thomas v. BSE Indus. Contractors, Inc.*, 624 So. 2d 1041 (Ala. 1993), did not apply the "manifest, present injury" rule. *See* Pet. at 5. *Thomas* was not even a personal injury case. Rather, it was a case brought under Alabama's tort of outrage cause of action, which required plaintiff to prove that defendant engaged in intentional or reckless conduct that was extreme and that caused plaintiff to suffer emotional distress so severe that no reasonable person could be expected to endure it. *Id.* at 1043. Summary judgment was affirmed in *Thomas* not because of a lack of a "manifest, present injury," but rather because the court concluded that "Thomas's generalized fear of cancer, unsupported by any clinical evidence, does not rise to the level of 'severe emotional distress' necessary to present a jury question on the tort of outrage." *Id.* at 1046.

ADDITIONAL JURISDICTIONAL FACTS

Petitioner's Statement of the Case contains many of the facts necessary to this Court's determination of its jurisdiction to review this case, but such Statement omits

a number of facts relevant to the jurisdictional analysis. Those omitted facts include all of the following:

1. There was no mention in Petitioner's decedent's[1] Complaint[2] of any constitutional or other challenge to the two year statute of limitations applicable to decedent's tort claims. App. 1.

2. Respondents in their May 23, 2001, Answer specifically averred that "all of plaintiff's claims are barred by the applicable statutes of limitation." App. 8.

3. Following investigation and discovery, on August 28, 2002, Respondents filed a motion for summary judgment, relying solely upon the argument that all of the claims presented were barred by the applicable statutes of limitation. App. 11; 15-16.

4. Decedent's October 7, 2002, response to the motion for summary judgment did not raise any challenge to the constitutionality of the statutes of limitation. Rather, the response simply averred that the tort claims were not barred by the two year statute of limitations because decedent had been exposed to benzene supplied by one of the other defendants within the two year period before he filed his Complaint. App. 19; 21-27.

5. On January 14, 2003, the trial court denied Respondents' motion for summary judgment as to decedent's

---

[1] Petitioner is the Executrix of the Estate of Jack Cline, who died shortly after the Supreme Court of Alabama issued its second no opinion affirmance in this case on January 5, 2007. For ease of reference, Mary Jane Cline will be referred to herein as "Petitioner" and Jack Cline will be referred to herein as "decedent."

[2] The Complaint also named as defendants BP Amoco Chemical Company, BP Amoco Corporation, Holmes Oil Company, Inc., and Thompson & Formby Company. In exchange for *pro tanto* settlement payments totaling $60,000.00, decedent in January of 2005 stipulated to the dismissal of his claims against all defendants other than Respondents.

tort claims, but it granted the motion for summary judgment as to decedent's breach of warranty claim.[3] App. 29.

6. On January 8, 2004, Respondents filed a second motion for summary judgment. In addition to renewing their contention that decedent's claims were barred by the two year statute of limitations, Respondents asserted that they were separately and independently entitled to summary judgment on state law substantive grounds. App. 30-31.

7. Decedent served his response on June 21, 2004. There was no mention therein of any challenge to the constitutionality of the two year statute of limitations. In fact, decedent simply took the position that the statute of limitations issue had already been decided in his favor and that the issue need not be reconsidered. App. 37.

8. The trial court heard arguments on Respondents' motion for summary judgment on January 12, 2005, and took the motion under submission at that time. During such arguments, counsel for decedent did not raise or assert any challenge to the constitutionality of the two year statute of limitations.

9. The constitutional due process issue was first suggested in an *amicus curiae* brief filed on February 8, 2005, while the summary judgment motion was under submission. But neither that brief nor its accompanying article was served upon the Attorney General of the State of Alabama, as is required by Alabama law when a party challenges the constitutionality of a statute.[4] ALA. CODE § 6-6-227 (1975).

---

[3] The breach of warranty claim was governed by a separate statute of limitations that required that the claim be brought within four years from the tender of delivery of the product. ALA. CODE § 7-2-725 (1975).

[4] As Respondents understand Petitioner's claimed constitutional question, it is that the Alabama statute of limitations, ALA. CODE § 6-5-38(l) (1975), is unconstitutional as applied to toxic tort victims with

(Continued on following page)

10. Decedent's Notice of Appeal did not identify any constitutional issue. The "ISSUES" section of the Notice of Appeal identified only a single non-constitutional issue:

> In an AEMLD personal injury action for injury caused by exposure to a toxic substance, does the statute of limitations accrue against all joint tortfeasors upon the plaintiff's last exposure to the toxic substance.

App. 52. Also, decedent answered "No" to the specific question on the Notice of Appeal form whether the provisions of Rule 44 of the Alabama Rules of Appellate Procedure[5] were applicable to the appeal. App. 50. That question is posed in a box on the Notice of Appeal form entitled "CONSTITUTIONAL ISSUES." *Id.*

11. On appeal to the Supreme Court of Alabama, in addition to arguing the bar created by the statute of limitations to sustain the trial court's judgment, Respondents also argued that the judgment should be affirmed because: (a) decedent had not produced substantial evidence that he experienced a substantial benzene exposure; (b) he had not produced substantial evidence that any product supplied by any Respondent was defective or unreasonably dangerous; and (c) he had not produced any admissible evidence causally associating his illness with any exposures. Pet. App. at 83. Under Alabama law, the Supreme Court of Alabama was authorized to affirm the

---

latent or late-discovered injuries, because it bars lawsuits filed more than two years after the last date on which the claimed exposure occurred.

[5] Rule 44 of the Alabama Rules of Appellate Procedure, similar to ALA. CODE § 6-6-227 (1975), requires that any party in an appellate matter challenging the validity of any statute serve a copy of the party's written brief on the Alabama Attorney General. Decedent's counsel did serve copies of his appellate briefs on the Alabama Attorney General, evidencing counsel's belief that a challenge to the constitutionality of a statute was involved.

judgment of the trial court on any of these bases, notwithstanding that the trial court's judgment relied solely upon the bar created by the statute of limitations. *Liberty Nat'l Life Ins. Co. v. Univ. of Ala. Hlth. Svcs. Found.*, 881 So. 2d 1013, 1020 (Ala. 2003).

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied because this Court lacks jurisdiction to reach the constitutional issue that Petitioner presents. However, in the event that the Court nevertheless determines that it has jurisdiction to review the no opinion affirmance of the Supreme Court of Alabama, the Court should nevertheless exercise its ample discretion and deny the petition because Petitioner has not demonstrated any compelling reason why this Court should exercise its discretion to accept the petition, nor has she demonstrated that a question of substantial constitutional importance is presented.

I. THIS COURT LACKS JURISDICTION.

Petitioner presents the substantive question whether ALA. CODE §§ 6-2-30(a) and 6-2-38(a), as interpreted by the Supreme Court of Alabama, violate Petitioner's due process rights under the Fourteenth Amendment of the United States Constitution. Pet. at i. However, before this Court can or should endeavor to answer this question, it must first determine whether it has jurisdiction to do so. *See, e.g., Adams v. Robertson*, 520 U.S. 83 (1997) (dismissing writ of certiorari as improvidently granted when it became apparent that the Court did not have jurisdiction). As stated in *Williams v. Kaiser*, 323 U.S. 471 (1945):

> It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction

> and that its decision of the federal question was necessary to its determination of the cause . . . And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it.

Id. at 477 (internal citations omitted); *see also Lynch v. New York*, 293 U.S. 52, 54 (1934). In the present case, the petition should be denied because the record does not show that the Supreme Court of Alabama was presented or decided the federal question. In fact, the Supreme Court of Alabama did not have jurisdiction to decide the federal question. Further, the decision of the state court could have been decided on independent and adequate state grounds, which likewise deprives this Court of jurisdiction to review the question presented.

A. The Supreme Court of Alabama did not decide the federal constitutional issue that is presented by the petition.

The threshold procedural requirement for United States Supreme Court review is that the federal question has been presented to the state courts. Charles A. Wright, et al., 16B Fed. Prac. & Proc. Juris. 2d § 4022. With "very rare exceptions," the Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [the Court] has been asked to review." *Adams*, 520 U.S. at 86 (citing *Yee v. Escondido*, 503 U.S. 519, 533 (1992)); *see also, e.g., Heath v. Alabama,* 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983); *Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner*, 139 U.S. 293 (1891) (dismissing appeal for want of jurisdiction where the highest court of the state affirmed with no opinion when it was

unclear whether the lower court decided on state or federal law grounds). Furthermore, it must appear "on the face of the record" that the state court considered the federal question "before it can be re-examined in this court." *Railroad Co. v. Rock*, 71 U.S. 177, 180 (1866) (holding even where state court certified that the federal question was presented this Court found it not authoritative and examined it independently and found the record did not support this contention).

The party seeking review must carry the burden of proving that the federal question was presented to the state courts. *E.g., Campbell v. Louisiana*, 523 U.S. 392, 401 (1998); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974); *Street v. New York*, 394 U.S. 576, 582 (1969). But, it is clear that the Supreme Court of Alabama did not review or decide the federal due process issue in this case. The Supreme Court of Alabama simply affirmed, without opinion, the trial court's grant of summary judgment. The trial court's grant of summary judgment was not based on, and did not even address, the federal due process issue. Pet. App. at 54-55. The trial court judgment was instead based on long-standing and oft-reaffirmed Alabama law relating to the applicable statutes of limitation: "plaintiff's claims against those defendants expired within two years of his last exposures to their products (1989), or within four years of the last tender of delivery of benzene by any of them to which he was exposed (1991)." Pet. App. at 55. The trial court also concluded that recent exposures to one manufacturer's product did not serve to resurrect decedent's claims against manufacturers of other products to which he was previously exposed.[6] *Id.* As Petitioner concedes, there is absolutely no mention of the federal due process issue in any of the concurrences or in the dissent

[6] This was the holding that decedent actually appealed to the Supreme Court of Alabama, according to his Notice of Appeal. App. 52.

to the no opinion affirmance of the Supreme Court of Alabama. Pet. at 9. Under the circumstances, Petitioner has failed to meet her burden of demonstrating that the question presented in this Court was presented to the court below or that the court below actually decided the question.

When the state court decision is silent on the federal issue, as in this case, this Court assumes that the issue was not properly presented to the highest state court and the petitioner bears the burden of defeating this assumption "by demonstrating that the state court had 'fair opportunity to address the federal question. . . .'" *Adams*, 520 U.S. at 86-87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)); *see also, e.g., New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). In *Adams*, the Court described the different ways a petitioner may satisfy this requirement:

> In some cases, we have focused on the need for petitioners either to establish that the claim was raised "'at the time and in the manner required by the state law,'" or to persuade us that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time."

Adams, 520 U.S. at 87 (internal citations omitted). In the present case, the federal claim was not presented to the Supreme Court of Alabama in the time and manner required by Alabama law, there are a number of substantive arguments that serve as independent and adequate state-law grounds for the decision of the Supreme Court of Alabama, and, in any event, the federal claim now made by Petitioner was not made with "fair precision and in due

time." Plainly, Petitioner has failed to make the requisite jurisdictional showing under *Adams*.

In *Webb v. Webb*, 451 U.S. 493 (1981), the petitioner argued that although the Georgia Supreme Court was silent in its opinion with regard to the federal question, the record demonstrated that she did raise the federal question and that the "State Supreme Court must be understood as having implicitly rejected her federal claim." 451 U.S. at 496. The Court recognized that the petitioner did use the constitutional phrase "full faith and credit" at several points in the proceedings, but found this insufficient. *Id.* at 498. Despite the absence of a full faith and credit provision in the Georgia Constitution, the Court still found that "[w]e cannot conclude on this record that petitioner raised the federal claim that she now presents to this court at any point in the state-court proceedings." *Id.* Citing the policy reasons[7] underlying the rule, this Court reasoned:

---

[7] Policy reasons discussed in *Webb* and in other case law include: (1) "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements." *Webb*, 451 U.S. at 499; *see also Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); (2) "The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue." *Webb*, 451 U.S. at 500; (3) "The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner." *Id.*; (4) "Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter." *Id.* at 500-01. As demonstrated more fully herein, denying writ of certiorari in this case would serve all of these policy concerns.

> At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

Id. at 501 (emphasis by the Court).

Similarly, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the petitioner did not raise federal due process claims in the state courts properly. Yee did not include a due process claim in his complaint, nor did he raise it in the California Court of Appeals. It was not until his petition for review to the California Supreme Court that Yee finally raised a substantive due process claim, but the California Supreme Court denied discretionary review. This Court stated that "[s]uch a denial, as in this Court, expresses no view as to the merits." *Id.* at 533. As such, this Court reasoned that the state court did not address the federal claim; therefore, the United States Supreme Court would not consider it. *Id.*

The burden on Petitioner to establish federal jurisdiction is even greater when the state's highest court is completely silent on the federal question, as in this case. In *Lynch*, *supra*, the state's highest court affirmed a trial court order without an opinion, "and the grounds of its decision [were] left to conjecture." 293 U.S. at 54. Although language in the lower court's decision suggested that it decided the federal issue, and "[i]t may be surmised . . . that the affirmance . . . went upon the same ground," that was insufficient to establish the Court's jurisdiction because "jurisdiction cannot be founded upon surmise." *Id.*; *see also Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n.3 (1983) ("The decision below does not discuss th[e federal issue], and '*when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state*

courts, unless the aggrieved party in this Court can affirmatively show the contrary.'") (internal citations omitted) (emphasis added); *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U.S. 300, 304 (1917) (in the "absence of an opinion expressed by the court below, it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the Federal questions, or upon such Federal questions, both being in the case."). It is significant in this regard that under Alabama law the Supreme Court of Alabama will not decide the constitutionality of a statue unless the question is "essential" to the disposition of the cause. *E.g., City of Mobile v. Gulf Dev.*, 171 So. 2d 247, 255 (Ala. 1965); *Matter of Anonymous*, 515 So. 2d 1254, 1256 (Ala. Civ. App. 1987).

In the present case, there is no opinion below.[8] Petitioner cannot establish from the record that the Supreme Court of Alabama considered the federal due process issue. In fact, Alabama law presumes this issue was not decided because a decision on the constitutional issue was not essential to the disposition of the cause. The record reveals only that the Supreme Court of Alabama affirmed the trial court judgment, and it is absolutely clear that the trial court judgment was not based upon, and did not even make mention of, any federal due process issue. Finally, and perhaps most significantly, Petitioner's own Notice of Appeal to the Supreme Court of Alabama affirmatively

[8] The Alabama Rules of Civil Procedure provide that a no opinion affirmance "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state," except for very limited purposes. Ala. R. App. Proc. 53(d). The Supreme Court of Alabama identified Rule 53(a)(2)(F) as the basis for its no opinion affirmance, which indicates that "[t]he Court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law." *Id.*; Pet. App. at 2.

states that no constitutional issues were being presented. App. 50. For all of the foregoing reasons, this Court lacks jurisdiction and should deny the petition.

B. The Supreme Court of Alabama did not have jurisdiction itself to decide the federal constitutional issue that is presented by the petition.

The Supreme Court of Alabama could not have decided the federal due process issue in any event because it lacked jurisdiction itself over the issue inasmuch as decedent failed to raise the issue in the trial court. Under Alabama law, the Supreme Court of Alabama may reach and decide a constitutional issue "only when it has been raised by a party at the trial level. . . ." *Ex parte St. Vincent's Hospital*, 652 So. 2d 225, 228 (Ala. 1994); *see also Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 322 (Ala. 1992); *Campbell v. Alabama Power Co.*, 567 So. 2d 1222, 1225 (Ala. 1990) (holding that issues not raised in the trial court may not be raised later on appeal); *Landers v. O'Neal Steel, Inc.*, 564 So. 2d 925, 926 (Ala. 1990) (failure to raise constitutional issue in trial court precludes review of that issue on appeal). Stated slightly differently, the law in Alabama is as follows:

> In order for an appellate court to review a constitutional issue, that issue must have been raised *by the appellant* and presented to and reviewed by the trial court. Additionally, in order to challenge the constitutionality of a statute, an appellant must identify and make specific arguments regarding what specific rights it claims have been violated.

Alabama Power Co. v. Turner, 575 So. 2d 551, 552 (Ala. 1991) (internal citations omitted) (emphasis added). Neither of these requirements was met in this case.

Petitioner simply argues that the constitutional issue was presented in an *amicus curiae* brief submitted to the trial court on February 4, 2005. Pet. at 7. But an argument not made by the parties themselves is not properly before the appellate court when presented in an *amicus* brief. 3B C.J.S. *Amicus Curiae* § 18; *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1970); *Nat'l Comm'n on Egg Nutrition v. Federal Trade Comm'n*, 570 F.2d 157, 160 n.3 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). This reasoning should apply with equal force to arguments made to the trial court only in an *amicus* brief.

In Alabama, an *amicus curiae* is not considered a party in the action, and it cannot litigate issues that are not presented by the parties: "An amicus curiae is not a party, cannot assume the functions of a party, and cannot control the litigation." *Brackin v. Trimmier Law Firm*, 897 So. 2d 207, 232 (Ala. 2004) (statement of non-recusal by Justice Brown) (quoting *State ex rel. Baxley v. Johnson*, 300 So. 2d 106, 110-11 (Ala. 1974)); *see also Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198, 202 n.1 (Ala. 2000). Instead, an *amicus curiae* must "accept the case before the court with the issues made by the parties." *Brackin*, 897 So. 2d at 233 (quoting *Village of North Atlanta v. Cook*, 133 S.E.2d 585 (Ga. 1963)).

In the present case, decedent never made mention in the trial court of any federal constitutional issue at all, and the trial court opinion upon which the appeal was taken to the Supreme Court of Alabama made absolutely no mention of either state or federal constitutional issues. Since this argument was not presented to the trial court by a party, the Supreme Court of Alabama lacked jurisdiction to review or decide the federal constitutional issue now argued by Petitioner, and its own lack of jurisdiction now deprives this Court of jurisdiction to review the issue.

C. The decision of the Supreme Court of Alabama was based on adequate and independent state law grounds.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see also, e.g., Lambrix v. Singletary*, 520 U.S. 518, 523 (1997); *Eustis v. Bolles*, 150 U.S. 361, 366 (1893) ("It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question to sustain the judgment, this Court will not review the judgment."). This is true whether the state law ground is substantive or procedural. *Coleman*, 501 U.S. at 729; *see also, e.g., Webb*, 451 U.S. at 498 n.4 (recognizing that an independent state procedural ground could bar consideration of the federal issue). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman*, 501 U.S. at 729.[9]

---

[9] In instances where state court decisions are based primarily on federal law grounds or are interwoven with federal and state grounds, the Court has employed a presumption that there is not a state law basis for the decision unless the state's highest court provides a "plain statement" that its decision was grounded on state law. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). However, this presumption is not applicable in every case and is not applicable in this case: "[i]n those

(Continued on following page)

In addition to the statute of limitations argument, Respondents rested their summary judgment motion on three state law substantive grounds, and Alabama law permitted the Supreme Court of Alabama to affirm the summary judgment on any of the grounds presented. On appeal from a summary judgment, the Supreme Court of Alabama performs a *de novo* review. *E.g., DeVenney v. Hill*, 918 So. 2d 106, 112 (Ala. 2005); *Mobile Airport Auth. v. HealthStrategies, Inc.*, 886 So. 2d 773, 779 (Ala. 2004). Accordingly, there is no presumption of correctness given to the trial court on any question of law. *E.g., Laster, Jr. ex rel. Laster, Sr. v. Norfolk Ry. Co., Inc.*, 2007 WL 30073, at *2 (Ala. 2007). As such, the Supreme Court of Alabama's decision could have rested on any of these state law grounds, each of which was independently adequate to support summary judgment in favor of Respondents. Since the summary judgment was affirmed without opinion, and since that affirmance likely was based in whole or in part on state substantive grounds,[10] the Court should adhere to *Coleman* and deny the petition.

---

cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." *Coleman*, 501 U.S. at 737; *see also Harris v. Reed*, 489 U.S. 255, 263 n.9 (1989) ("[The *Long* rule] necessarily applies only when a state court has been presented with the federal claim . . . "); *Long*, 463 U.S. at 1040 ("[w]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . . ").

[10] The Committee Comments to Rule 53 of the Alabama Rules of Civil Procedure suggest that a no-opinion affirmance is not appropriate in a case in which the court has been called upon "to construe a provision of a constitution," so the no-opinion affirmance in this case suggests that the Supreme Court of Alabama did not believe that the constitutional issue was before the Court. *See* Ala. R. Civ. P. 53 comm. cmts.

II. THERE IS NO COMPELLING REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW THIS CASE.

Even if this Court concludes that it has jurisdiction to review the no opinion affirmance of the Supreme Court of Alabama, the Court should nevertheless refuse to grant discretionary review for all or any of the reasons set forth below.

A. Decedent was not deprived of his cause of action.

In 1987, when decedent was last exposed to benzene claimed to have been supplied by Respondents, Alabama law authorized him to pursue a claim against Respondents at any time within the two year period following the date on which he was last exposed. *American Mut. Liab. Ins. Co. v. Phillips*, 491 So. 2d 904, 906 (Ala. 1986); *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263, 268 (Ala. 1981); *Garrett v. Raytheon Co., Inc.*, 368 So. 2d 516 (Ala. 1979).[11] That was so because, at that time, Alabama law recognized that a cause of action accrued as soon as the claimant was entitled to maintain an action thereon, regardless of whether the full amount or extent of damages was apparent at the time of the first legal injury. *Langley v. Mut. Fire, Marine and Inland Ins. Co.*, 512 So. 2d 752, 764-65 (Ala. 1987); *Armstrong v. Life Ins. Co. of Virginia*, 454 So. 2d 1377, 1379 (Ala. 1984); *Garrett v. Raytheon Co., Inc.*, 368 So. 2d 516, 519 (Ala. 1979); *Home*

[11] The last date of exposure rule announced in *Garrett* has been repeatedly reaffirmed by the Supreme Court of Alabama. *See Becton v. Rhone-Poulenc, Inc.*, 706 So. 2d 1134, 1135-36 (Ala. 1997); *Johnson v. Garlock, Inc.*, 682 So. 2d 25, 28 (Ala. 1996) (holding that date of last exposure rule did not violate state or federal constitutional rights); *Hubbard v. Liberty Mut. Ins. Co.*, 599 So. 2d 20, 22 (Ala. 1992); *Hillis v. Rentokil, Inc.*, 596 So. 2d 888, 890 (Ala. 1992).

Ins. Co. v. Stuart-McCorkle, Inc., 285 So. 2d 468, 473 (Ala. 1973).

Decedent did not file a lawsuit against Respondents during that statutorily permitted period. Had he done so, he would have had the benefit of the *Garrett* decision, wherein the Supreme Court of Alabama held that "in the instant case the damage must have occurred at the time of exposure else defendant would not be liable," and that "[t]he injury in this case occurred on the date or dates of exposure." *Garrett,* 368 So. 2d at 520. Indeed, the *Garrett* court went on to specifically state that: "[t]his is not a case where an injury did not occur until it made itself manifest by its symptoms." *Id.* at 520-21. Thus, if decedent had filed a timely action against Respondents, he could have litigated his claim that Respondents supplied benzene products to his employer that were defective and unreasonably dangerous and that he was exposed to unhealthy levels of such products.

In an effort to create a federal constitutional issue that would permit review by this Court, Petitioner now argues that a decision[12] rendered by the Supreme Court of Alabama *twelve years after* the statute of limitations expired on her decedent's personal injury claim unconstitutionally deprived him of his cause of action. If the claimed inconsistencies between the decisions in *Garrett* and *Hinton* do in fact create or threaten a constitutional deprivation, judicial review of that claimed deprivation must await a plaintiff who has filed a timely action that has been dismissed for want of a manifest present injury. Decedent was not such a plaintiff.

---

[12] *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001), was decided on September 14, 2001.

B. There is no substantial federal question presented.

There is no question but that if the Alabama Legislature had amended the two year statute of limitations for tort actions while decedent had an existing right to pursue a cause of action against Respondents, and did not in connection therewith provide him reasonable time to pursue that cause of action, such amendment would have violated decedent's due process rights, as explained in *Terry v. Anderson*, 95 U.S. 628, 633 (1877). But this is not such a case.

Instead, decedent had a full two years in which to pursue his cause of action against Respondents, and he failed to do so. Under the prior decisions of this Court, decedent was thereby afforded the process to which he was constitutionally due. *Terry*, 95 U.S. at 632-33 ("This court has often decided that statutes of limitation affecting an existing right are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect."). The 2001 *Hinton* decision simply does not implicate decedent's federal due process rights.

While this Court has never squarely decided whether a statute of limitations enacted by a state legislature may constitutionally bar pursuit of a personal injury action before the plaintiff discovers that he or she has suffered an injury, the Court has passed on the opportunity to decide that specific question on at least seven occasions.

In *Woodward v. Burnham City Hospital*, 449 U.S. 807 (1980), the Court dismissed for want of a substantial federal question[13] an appeal of a decision of the Supreme

[13] Summary disposition by this Court of an appeal for want of a substantial federal question is a disposition on the merits of the case. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959).

Court of Illinois in which that court found no due process violation from legislative action "establishing the 4-year outer limit within which to file a complaint for medical malpractice." *See Anderson v. Wagner*, 402 N.E.2d 560, 568 (Ill. 1979).

In *Ellerbe v. Otis Elevator Co.*, 459 U.S. 802, *reh. denied*, 459 U.S. 1059 (1982), the Court similarly dismissed for want of a substantial federal question the appeal of a decision of the Texas Court of Civil Appeals holding that due process was not violated by a statute that barred suits against licensed engineers or architects for damages arising out of unsafe conditions of real property, where the relevant improvements to the property were completed more than ten years before the date the lawsuit was filed. *See Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870, 873 (Tex. Civ. App. 1981).

In *Bunker v. Nat'l Gypsum Co.*, 460 U.S. 1076 (1983), the court dismissed for want of a substantial federal question an appeal of a decision of the Supreme Court of Indiana, which held that Indiana's three year statute of limitations for asbestos exposure claims, *which commenced to run on the last date of exposure*, did not violate plaintiff's due process rights. *See Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8, 13-14 (Ind. 1982).

On four other occasions, this Court has denied petitions for writs of certiorari in cases in which it would have been necessary to address the question presented in this petition. *Clark v. Gulesian*,[14] 400 U.S. 993 (1971); *Pitts v.*

[14] The First Circuit decision upheld Maine's medical malpractice statute of limitations, which began to run at the time of the wrongful act, finding that it was not an unconstitutional denial of equal protection or due process despite the fact that, in some cases, by the time the plaintiff learned of the injury, the cause of action would be barred. *Clark v. Gulesian*, 429 F.2d 405, 406 (1st Cir. 1970) ("Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose, and in the

(Continued on following page)

GAF Corp.,[15] 464 U.S. 1003 (1983); *Wayne v. Tennessee Valley Auth.*,[16] 469 U.S. 1159 (1985); *Griffin v. Ford Motor Co.*,[17] 488 U.S. 822 (1988).

Accordingly, this Court has not traditionally believed that the question presented by Petitioner herein is a substantial federal question that requires the Court's attention and review.

C. None of the considerations set out in Supreme Court Rule 10 is present in this case.

Supreme Court Rule 10 identifies certain considerations that bear upon whether the Court should exercise its discretion to review a matter presented on a certiorari petition. Those considerations do not suggest that discretionary review is appropriate in this case.

---

avoidance of stale claims, however free from fault the claimant's delay may be. Such a conclusion does not deprive the plaintiff of any constitutional right to fair or equal treatment.").

[15] The Seventh Circuit upheld Indiana's ten year statute of repose for product liability actions, which barred plaintiff's wrongful death action. *See Pitts v. Unarco Indus., Inc.*, 712 F.2d 276, 279 (7th Cir. 1983) ("we cannot accept plaintiff's argument that the Indiana Product Liability Act's ten-year statute of repose violates due process under the federal and Indiana Constitutions.").

[16] The Fifth Circuit decision upheld Tennessee's ten year statute of repose for product liability actions, which statute as adopted and applied resulted in some causes of action being barred before they accrued. *Wayne v. Tennessee Valley Auth.*, 730 F.2d 392, 404 (5th Cir. 1984).

[17] The underlying Eleventh Circuit decision in *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir. 1988), upheld Florida's twelve year statute of repose for product liability actions, specifically holding that "Appellant's facial attack on the constitutionality of the Florida statute of repose is without merit. The United States Supreme Court, in cases raising the constitutionality of similar statutes, has found no violation of the Fourteenth Amendment." *Id.* at 1373.

1. There is no conflict between the no opinion affirmance of the Supreme Court of Alabama and the decision of any other state court of last resort or any United States court of appeal.

(a) State decisions.

Petitioner devotes six pages of her petition to the argument that the decision of the Supreme Court of Alabama conflicts with "numerous contrary decisions of other state courts of last resort." Pet. at 16-21. Yet one searches Petitioner's citations in vain for a state court decision holding that a date of last exposure accrual rule violates a party's due process rights. Instead, the decisions cited by Petitioner appear to be simple reaffirmations of this Court's holding in *Terry v. Anderson* that the enactment of a statute of limitations that does not provide a reasonable time for a party having a then-existing cause of action to pursue an action is unconstitutional. Alabama law, as noted above, provided decedent with a two year period following his last exposure in which to pursue an exposure-related cause of action, and that period was not modified. Since this is not a case in which the Alabama Legislature enacted a statute that retroactively reduced or eliminated the period available to decedent to pursue a cause of action, the *Terry* line of cases discussed at pages 18 through 21 of the petition are inapposite.

The truly instructive state court decisions in this regard that are mentioned in the petition are *Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982), *cert. denied*, 460 U.S. 1076 (1983), *Owen v. Wilson*, 537 S.W.2d 543 (Ark. 1976), and *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. 1968). The *Bunker* court held that Indiana's three year statute of limitations for asbestos exposure claims, which commenced to run on the last date of exposure, did not violate plaintiff's due process rights. *Bunker*, 441 N.E. 2d at 13-14. The courts in *Owen* and *Laughlin* upheld the

Arkansas and Missouri medical malpractice statutes of limitation, despite the fact that each ran from the time of the wrongful act and therefore could bar medical malpractice claims that were not timely discovered. *Owen*, 537 S.W.2d at 545; *Laughlin*, 432 S.W.2d at 314-15.[18]

The proper entity to address the harsh effect of a statute is the state legislature. In response to the decisions in *Bunker*, *Owen* and *Laughlin*, state legislatures took action to address the claimed inequity in their respective statutory schemes. Such legislative action is precisely what the Supreme Court of Alabama advocated in *Garrett*, 368 So. 2d at 521. When the Alabama Legislature took such action, however, it did not do so properly, and, after the Act it passed was declared unconstitutional in 1982, it has not again enacted such legislation.[19]

Contrary to Petitioner's argument, no state court has yet recognized a constitutional right to a discovery rule applicable to all toxic tort claims. Therefore, the no opinion affirmance by the Supreme Court of Alabama is not in conflict with the decision of any other state court of last resort.

---

[18] Courts in Delaware and Arizona have likewise concluded that no due process violation occurs when the effect of a statute of limitations is to bar a cause of action before the injury occurs or is discovered. *Dunn v. Felt*, 379 A.2d 1140 (Del. Super. 1977) (three year medical malpractice statute of limitations); *Landgraff v. Wagner*, 546 P.2d 26, 31-32 (Ariz. App. 1976) ("we do not agree that due process demands awareness of the right of action before the statute of limitations will run against it.").

[19] A bill (SB205) is currently pending in the Judiciary Committee of the Alabama State Senate that would adopt a discovery accrual rule for toxic tort actions. Similar legislation has been proposed but not adopted in the last two legislative sessions.

(b) Federal decisions.

Petitioner's arguments over pages 22 through 26 of her petition that the no opinion affirmance of the Supreme Court of Alabama also conflicts with decisions of various United States courts of appeal and that the opinions of such courts of appeal are also in conflict with each other, are likewise without merit. Petitioner failed to identify any federal court of appeals decision that has ever held unconstitutional a state toxic tort statute of limitations that runs from the date of last exposure. Instead, Petitioner relies on *Terry* and its progeny, which require states amending their statutes of limitation to provide a reasonable time within which a cause of action may be pursued after it has accrued. Pet. at 22-26. This is clearly misplaced reliance, for the *Terry* line of cases does not address whether a date of last exposure rule violates the Due Process Clause.

The four federal cases that Petitioner cites for the proposition that "a state may not constitutionally eliminate a cause of action without giving a litigant a reasonable amount of time to file suit" each involved a situation in which a state legislature enacted a law that eliminated or substantially reduced the period within which a party could pursue an existing cause of action. Pet. at 22-23. Since the instant case does not involve any claim that decedent's existing rights were barred by legislative action, these federal decisions cannot be said to be in conflict with the decisions sought to be reviewed here.

Moreover, those four cited federal decisions do not, as Petitioner contends, conflict with the four other United States court of appeals opinions cited and discussed by Petitioner at pages 23 and 24 of her petition. None of the latter decisions involved a situation in which a state legislature had enacted a law that eliminated or substantially reduced the period within which an existing cause of action could be filed. To the contrary – and entirely

consistent with the Alabama law under attack in the petition in this case – each of those latter decisions held that a state may constitutionally enact and enforce a statute of limitations even where its application may in some cases bar the filing of the cause of action before the plaintiff becomes aware of the existence of the cause of action. The Third Circuit decision in *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 555 (3rd Cir. 1986), provides a reasoned analysis of why such statutes of limitations do not violate the Due Process Clause:

> Because statutory periods are in some sense arbitrary, the period to initiate suit occasionally expires before a claimant has sustained any injury . . . or before the claimant knows he has sustained an injury. . . . Such a statute does not violate due process if the limitation period is otherwise reasonable. . . . Plaintiff's due process claim must therefore fail because here the period is reasonable.

Id. at 558 (citations omitted). Based upon this reasoning, the court upheld Pennsylvania's wrongful death and survival statutes of limitation in the face of an argument that the court should have instead judicially adopted a "discovery rule."

The four decisions cited by Petitioner as consistent with the no opinion affirmance decision of the Supreme Court of Alabama in this case were from the Third, Seventh, and Eighth Circuits. There are consistent decisions from the First, Second, Sixth, Ninth, and Tenth Circuits as well. *See Clark v. Gulesian*, 429 F.2d 405, 406 (1st Cir. 1970), *cert. denied*, 400 U.S. 993 (1971); *Dincher v. Marlin Fire Arms Co.*, 198 F.2d 821, 822-23 (2nd Cir. 1952) (upholding Connecticut statute that barred negligence claims filed more that one year from date of wrongful act, no matter when injury occurred); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 139-41 (6th Cir. 1983) (upholding constitutionality of Texas statute limiting period within which

product liability action may be filed, even though statute would bar some claims before an injury occurred); *Pittman v. United States*, 341 F.2d 739, 741 (9th Cir. 1965) (upholding constitutionality of two year statute of limitations for Federal Tort Claims Act action even as to minors who were unable to pursue their claims without appointment of a guardian *ad litem*); *Brubaker v. Cavanaugh*, 741 F.2d 318, 320-21 (10th Cir. 1984) (rejecting due process challenge to Kansas medical malpractice statute of limitations that barred suits commenced more than four years after wrongful act).

The foregoing decisions are consistent as well with decisions from seven different United States courts of appeal rejecting federal constitutional challenges to state statutes of repose. *See Dinh v. Rust Int'l Corp.*, 974 F.2d 500, 502 (4th Cir. 1992) (upholding Virginia statute of repose applicable to injuries caused by improvements to real property); *Harris v. Black Clawson Co.*, 961 F.2d 547, 554-55 (5th Cir 1992) (upholding Louisiana's ten year statute of repose for defective design or construction claims); *Wayne v. Tennessee Valley Auth.*, 730 F.2d 392, 404 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1367-68 (6th Cir. 1984) (upholding Ohio's ten year statute of repose for actions arising out of improper design or construction of improvements to real property); *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 510-12 (8th Cir. 1982) (upholding South Dakota's six year statute of repose for product liability actions); *Lourdes High School v. Sheffield Brick & Tile Co.*, 870 F.2d 443, 446 (8th Cir. 1989) (upholding Minnesota's fifteen year statute of repose for actions based upon real property damage); *Norwest Bank v. W.R. Grace & Co.*, 960 F.2d 754, 756-58 (8th Cir. 1998) (rejecting equal protection challenge to Nebraska's ten year statute of repose for product liability actions); *Branson v. O.F. Mossberg & Sons, Inc.*, 221 F.3d 1064, 1065 (8th Cir. 2000) (upholding Iowa's fifteen

year statute of repose for product liability actions); *Fields v. Legacy Health System*, 413 F. 3d 943, 956-57 (9th Cir. 2005) (upholding Oregon's five year statute of repose for medical malpractice actions); *Eaton v. Jarvis Prods. Corp.*, 965 F.2d 922, 931 n.10 (10th Cir. 1992) (upholding Colorado's seven year statute of repose for certain product liability actions); *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991) (upholding Indiana's ten year statute of repose for product liability actions); *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369, 1373-74 (11th Cir.), *cert. denied sub nom. Griffin v. Ford Motor Co.*, 488 U.S. 822 (1988). These decisions are significant because statutes of repose are much more likely than are statutes of limitation to bar an action before it accrues or before an injured party has become aware of its existence, yet such statutes have been consistently upheld as constitutional despite creating or causing the very type of deprivation challenged in this petition.

There is no conflict between the no opinion affirmance of the Supreme Court of Alabama and the decisions of any United States court of appeals. Nor is there any conflict to be resolved between the decisions of the federal courts of appeal themselves. Therefore, there is no reason based on conflicting decisions for this Court to exercise its discretion to review this matter.

2. The no opinion affirmance of the Supreme Court of Alabama did not decide an important question of federal law that has not been decided by this Court.

As discussed above in Section II.B., this Court has repeatedly suggested that the question presented here is not an important or substantial question of federal law, by denying petitions for certiorari raising the same or similar issue on four separate occasions, and by dismissing three other appeals raising the same or similar issues for want of a

substantial federal question. If it is assumed *arguendo* that the Supreme Court of Alabama did "decide" the due process issue against Petitioner's decedent, it is nevertheless clear that this Court does not consider the question presented in this petition to be an important question of federal law.

3. The no opinion affirmance of the Supreme Court of Alabama was not decided in a way that conflicts with relevant decisions of this Court.

As is discussed above, the Court has on no less than three occasions dismissed appeals raising similar claims for want of a substantial federal question. *Bunker,* 460 U.S. 1076; *Ellerbe*, 459 U.S. 802, *reh. denied*, 459 U.S. 1059; *Woodward*, 449 U.S. 807. Those decisions amount to dispositions on the merits. The no opinion affirmance issued by the Supreme Court of Alabama, as characterized by Petitioner, is entirely consistent with those decisions.

If it is assumed *arguendo* that the Supreme Court of Alabama actually "decided" that no due process violation exists in the application of the date of last exposure rule for statute of limitations analysis in Alabama toxic tort cases, such decision does not conflict with any prior decision of this Court. The Court has recognized the importance of statutes of limitations and the role that they play:

> Statutes of limitation are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. . . . there comes a point in time at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Board of Regents of University of State of New York v. Tomanio, 446 U.S. 478, 487 (1980). In addition, the Court

has recognized that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver v. Silver*, 280 U.S. 117, 122 (1929). Furthermore, and perhaps most significant to this case, the Court has recognized that "[a] person has no property, no vested interest, in any rule of the common law." *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

Therefore, a state court decision holding that no due process violation occurs when a state provides two years from the date of last exposure in which to file an exposure-related action, rather than two years from the date of discovery of an exposure-related injury, does not conflict with relevant decisions of this Court.

D. There is no manifest injustice resulting from the decision of the Supreme Court of Alabama.

Petitioner invokes "manifest injustice" as an additional claimed basis upon which discretionary review ought to be permitted in this case, portraying her decedent as a victim of what she describes as "perverse rules adopted by the Alabama Supreme Court." Pet. at 26-30. Yet decedent was no more a victim of the rules obtaining in Alabama than plaintiffs in other jurisdictions have been when they have found their causes of action barred by the time that they have been injured or by the time that they have discovered that they have been injured.

The loss of a cause of action to a statute of limitations is not manifest injustice, because "[s]tatutes of limitations. . . . are statutes of repose. . . . [that] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117

(1979). Indeed, in this case, when decedent sought to litigate the propriety of certain claimed exposures to benzene that had ceased fourteen years earlier, the plant at which the exposures were claimed to have occurred had closed, no records remained to reveal what products had been supplied to or used by decedent, and decedent himself had reported to his treating physician that the substance to which he was exposed was xylene, not benzene. The loss of a cause of action in such circumstances is harsh but not unconstitutional:

> While the statutes are harsh, we cannot agree that they deny due process or equal protection or that they invalidly deprive one of access to the courts in light of policy reasons for the statutes such as avoiding the risk and costs of litigation to manufacturers after a lengthy passage of time.

Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1225 (10th Cir. 1991). Such statutes promote justice, not injustice. *Order of R.R. Telegraphers v. Ry. Exp. Agency*, 321 U.S. 342, 348-49 (1944). There is no manifest injustice in the refusal of the Supreme Court of Alabama to judicially engraft a discovery rule[20] onto Alabama's two year statute of limitations so as to permit Petitioner to litigate the propriety of her decedent's long ago exposures.

---

[20] The Supreme Court of Alabama has specifically refused to judicially adopt such a discovery accrual rule on at least seven occasions since 1979. *See Boyce v. Cassese*, 941 So. 2d 932, 946 n.2 (Ala. 2006); *Payton v. Monsanto Co.*, 802 So. 2d 829, 835 (Ala. 2001); *Travis v. Ziter*, 681 So. 2d 1348, 1354 (Ala. 1996); *American Mut. Liab. Ins. Co. v. Phillips*, 491 So. 2d 904, 906 (Ala. 1986); *Moon v. Harco Drugs, Inc.*, 435 So. 2d 218, 220 (Ala. 1983); *Ramey v. Guyton*, 394 So. 2d 2, 4 (Ala. 1980); *Garrett v. Raytheon Corp., Inc.*, 368 So. 2d 516, 521 (Ala. 1979).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the petition.

Respectfully submitted,

GEORGE M. WALKER
Counsel of Record
HAND ARENDALL, L.L.C.
3000 AmSouth Bank Building
Post Office Box 123
Mobile, Alabama 36601
Phone: (251) 432-5511
Fax: (251) 694-6375

LOUIS C. WOOLF
WOOLF, MCLANE, BRIGHT,
ALLEN & CARPENTER
Post Office Box 900
Knoxville, Tennessee 37901-0900
Phone: (615) 215-1000

Attorneys for Respondents
Ashland, Inc.;
Chevron Phillips Chemical LP,
successor in interest to Chevron
Chemical Company, LLC;
and Exxon Mobil Corporation

IN THE CIRCUIT COURT FOR JEFFERSON COUNTY OF THE STATE OF ALABAMA

BESSEMER DIVISION

JACK CLINE,	)	
Plaintiff,	)	
vs.	)	
ASHLAND, INC., BP AMOCO CHEMICAL COMPANY, INC., BP AMOCO CORPORATION, CHEVRON CHEMICAL COMPANY, EXXON MOBIL CORPORATION, HOLMES OIL COMPANY, INC., and THOMPSON & FORMBY COMPANY, AND FICTITIOUS DEFENDANTS WHOSE NAMES ARE UNKNOWN AT THIS TIME BUT WHOSE NAMES WILL BE SUPPLIED BY AMENDMENT WHEN KNOWN, AS DESCRIBED IN ATTACHMENT A HERETO,	)	**CIVIL ACTION NO.**
Defendants.	)	

COMPLAINT

(Filed Apr. 6, 2001)

Comes now, Jack Cline, and show unto this Honorable Court as follows:

BACKGROUND FACTS

1. Beginning in the late 1950's and continuing until recently, Jack Cline, (hereinafter–"Plaintiff"), was employed at the railroad wheel manufacturing plant owned and operated by Griffin Wheel Company and located in the Bessemer Division of Jefferson County and also self-employed as a carpenter in Jefferson County and elsewhere within the State of Alabama. During the course of his career as a chemist and carpenter, Plaintiff worked in various locations (hereinafter the "Exposure Sites") where he came into contact with and was exposed to chemical solvents and other chemical products.

2. As a result of his work-related exposure to chemical solvents and other materials manufactured by Defendants, Plaintiff contracted Acute Myelogenous Leukemia.

3. The defendants herein are companies identified as having produced, manufactured, distributed, sold and/or specified chemical solvents and other chemical products and materials to which Plaintiff was exposed during his employment (the "Defendants").

4. The Defendants in this complaint and which are included in any reference to "Defendants" herein are as follows:

(a) Ashland, Inc., a Kentucky corporation, with principal place of business located at 1409 Winchester Avenue, Ashland, Kentucky;

(b) BP Amoco Chemical Company, a Delaware corporation, with principal place of business located at 511 South Boston Avenue, Tulsa, Oklahoma;

(c) BP Amoco Corporation, an Indiana corporation, with principal place of business located in Indianapolis, Indiana;

(d) Chevron Chemical Company, a Delaware corporation, with principal place of business located in Richmond, California;

(e) Exxon Mobil Corporation, a New Jersey corporation, with principal place of business located in Irving, Texas;

(f) Holmes Oil Company, an Alabama corporation, with principal place of business located in Bessemer, Alabama;

(g) Thompson & Formby, Inc., a Florida corporation, with principal place of business located at 825 Crossover Lane, Memphis, Tennessee, and

(h) Fictitious parties described in Attachment A.

Count One

5. Plaintiffs' initial cause of action is grounded in the Alabama Extended Manufacturer's Liability Doctrine and is stated against the Defendants and fictitious parties in this Complaint.

6. The chemical products and materials produced, manufactured, distributed, sold and/or specified by the Defendants and used in or applied at the Exposure Sites were unreasonably dangerous when applied to their intended use in the usual and customary manner, and the Defendants caused the unreasonably dangerous materials and products to enter the market, as a result of which

Plaintiff was exposed to dangerous chemicals and thereby suffered grave and progressive bodily injuries.

7. The chemical products and materials produced, manufactured, distributed, sold and/or specified by the Defendants and used in or applied at the Exposure Sites were unreasonably dangerous when applied to their intended use in the usual and customary manner in that (a) the chemicals contained in such products and materials are highly carcinogenic and otherwise injurious to the tissue of the human body when inhaled into the respiratory system or ingested into the digestive system and (b) the chemicals contained in such products and materials are known to create or release toxic fumes, which are subject to being readily inhaled or ingested into the respiratory and digestive systems of persons in the vicinity thereof.

8. The Defendants knew or should have known in the exercise of ordinary care and diligence that such products and materials were unreasonably dangerous; nonetheless, the Defendants made no effort to recall their products and materials from any plants, buildings, or machinery, including particularly the locations where Plaintiff was employed. In addition, the Defendants failed to warn the Plaintiff and others similarly situated of the facts concerning the unreasonably dangerous nature of the products and materials which they placed into the stream of commerce. The Defendants thus caused Plaintiff-to be exposed to their hazardous chemical products and materials without warning of the dangers thereof or taking preventative measures to protect the Plaintiff from exposure, as a proximate result of which the Plaintiff was exposed to said products and suffered grave and progressive bodily injury.

Count Two

9. Plaintiff adopts and realleges, as if fully set forth herein, the factual and other averments as set forth above.

10. Defendants produced, manufactured, distributed, and sold chemical products and materials which were used or installed in or applied to the Exposure Sites where Plaintiff was employed.

11. The Defendants impliedly warranted that said chemical products and materials were fit for their intended uses and further warranted that said chemical products and materials were merchantable.

12. The chemical products and materials produced, manufactured, distributed, and/or sold by the Defendants and used or installed in or applied to the Exposure Sites were unreasonably dangerous as applied to their intended use. Therefore, the Defendants breached their implied warranties in that the chemical products and materials are highly carcinogenic and otherwise injurious to the tissue of the human body when inhaled into the respiratory system or ingested into the digestive system, etc.

13. The chemical products and materials distributed by Defendants were not fit for use for their intended purpose; rather, they were unsafe, unfit, and unusable for their intended purposes. The condition of the Defendants' products constituted a breach of Defendants' implied warranty of fitness for a particular purpose and merchantibility. As a result of the Defendants' breach of their implied warranties, the Plaintiff suffered grave and progressive bodily injuries associated with Acute Myelogenous Leukemia, resulting in pain and suffering, medical expenses and other damages.

WHEREFORE, PREMISES CONSIDERED, Plaintiff hereby demands judgment against the defendants with respect to the foregoing Counts hereof in an amount the jury may assess as just, together with such other and further relief as the Court deems proper.

/s/ Mark Rowe
Mark L. Rowe
One of the Attorneys for Plaintiffs

OF COUNSEL:

Environmental Attorneys Group, L.L.C.
3529 Seventh Avenue South
Birmingham, AL 35222
(205) 326-1000

PLAINTIFFS' ADDRESS:
c/o 3529 Seventh Avenue South
Birmingham, Alabama 35222

JURY DEMAND

Plaintiffs demand a trial by struck jury on all issues.

/s/ Mark Rowe
Of Counsel

ATTACHMENT A

The fictitious parties referred to in the Complaint to which this Attachment A is attached are, whether singular or plural, those persons or entities (or that person or entity) who or which are described as follows: Nos. 1 through 10, who or which constructed, manufactured, or produced any hazardous chemical product to which the

Plaintiff was exposed; Nos. 11-20, who or which formulated, manufactured or produced any hazardous chemical product substantially identical to and indistinguishable from any hazardous chemical product to which the Plaintiff was exposed; Nos. 21-30, who or which refined, formulated, manufactured or produced any chemical compound or component which was included in the products and materials produced by the persons or entities referred to as Nos. 1 through 10 or 11 through 20 above; Nos. 31-40, who or which distributed, installed or applied (or specified the installation or application of) the products and materials refined, formulated, manufactured or produced by the persons or entities referred to as Nos. 1 through 10, 11-20, or 21-30 above; Nos. 41-50, who or which occupied, controlled and/or owned Exposure Sites on the premises of which Plaintiff worked; Nos. 51-60, who or which are the alter egos of, predecessors of, successors in interest to or mere continuations of (including any trust or other entity established pursuant to order of any bankruptcy court for the benefit of chemical exposure victims), or entities controlled as mere instrumentalities of, the persons or entities described as Nos. 1 through 60 above; and Nos. 61-70, who or which control or controlled the persons or entities described as Nos. 1 through 60 above as adjuncts or mere instrumentalities.

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

BESSEMER DIVISION

JACK CLINE, Plaintiff, vs. ASHLAND INC,; BP AMOCO CHEMICAL COMPANY, INC; BP AMOCO CORPORATION; CHEVRON CHEMICAL COMPANY; EXXON MOBIL CORPORATION; et al., Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. CV-2001-423

ANSWER

Defendants Ashland, Inc., and Exxon Mobil Corporation, answer plaintiffs Complaint as follows:

* * *

FIFTH AFFIRMATIVE DEFENSE

For further answer to the Complaint of the plaintiff, these defendants aver that all of plaintiff's claims are barred by the applicable statutes of limitation.

/s/ W. Craig Hamilton
GEORGE M. WALKER
W. CRAIG HAMILTON

HAND ARENDALL, L.L.C.
3000 AmSouth Bank Building
Post Office Box 123
Mobile, Alabama 36601
Phone: (334) 432-5511
Fax: (334) 694-6375

TRACY R. DAVIS
HAND ARENDALL, L.L.C.
900 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203
Phone: (205) 324-4400
Fax: (205) 322-1163

LOUIS C. WOOLF
Attorneys for Defendants
Ashland, Inc.
ExxonMobil Corporation

WOOLF, MCLANE, BRIGHT,
ALLEN & CARPENTER
Post Office Box 900
Knoxville, Tennessee 37901-0900
Phone: (865) 215-1000
Fax: (865) 215-1015

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, May 23, 2001, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ W. Craig Hamilton

COUNSEL OF RECORD:

Mark L. Rowe, Esquire
Environmental Attorneys Group, L.L.C.
3529 Seventh Avenue South
Birmingham, Alabama 35222

Steve A. Tucker, Esquire
Richard E. Davis, Esquire
Cabaniss, Johnston, Gardner, Dumas & O'Neal
Post Office Box 830612
Birmingham, Alabama 35283-0612

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

BESSEMER DIVISION

JACK CLINE, Plaintiff, vs. ASHLAND INC,; BP AMOCO CHEMICAL COMPANY, INC; BP AMOCO CORPORATION; CHEVRON CHEMICAL COMPANY; EXXON MOBIL CORPORATION; et al., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. CV-2001-423 **ORAL ARGUMENT REQUESTED**

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, SUCCESSOR IN INTEREST TO CHEVRON CHEMICAL COMPANY, LLC, AND EXXON MOBIL CORPORATION

Defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation, move the Court, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, for entry of summary judgment in their favor in this matter. In support of this motion, defendants aver that there is no material issue of disputed fact, and that they are each entitled to summary judgment as a matter of law. This motion is based upon the pleadings, the narrative summary of undisputed facts and brief in support of motion for summary judgment filed herewith, and the

evidentiary submission in support of motion for summary judgment also filed herewith.

/s/ George M. Walker
GEORGE M. WALKER

HAND ARENDALL, L.L.C.
3000 AmSouth Bank Building
Post Office Box 123
Mobile, Alabama 36601
Phone: (251) 432-5511
Fax: (251) 694-6375

TRACY R. DAVIS
HAND ARENDALL, L.L.C.
900 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203
Phone: (205) 324-4400
Fax: (205) 322-1163

LOUIS C. WOOLF
M. DENISE MORETZ
Attorneys for Defendants
Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation

WOOLF, MCLANE, BRIGHT,
ALLEN & CARPENTER
Post Office Box 900
Knoxville, Tennessee 37901-0900
Phone: (865) 215-1000
Fax: (865) 215-1015

Defendants respectfully request oral argument on their motion

/s/ George M. Walker

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, August 26, 2002, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ George M. Walker

COUNSEL OF RECORD:

Mark L. Rowe, Esquire
Environmental Attorneys Group, L.L.C.
Homewood Executive Center, Suite 107
1900 28th Avenue South
Birmingham, Alabama 35209

Richard E. Davis, Esquire
Cabaniss, Johnston
Post Office Box 830612
Birmingham, Alabama 35283-0612

E. Martin Bloom, Esquire
Friedman, Leak & Bloom, P.C.
3800 Colonnade Parkway, Suite 650
Birmingham, Alabama 35243

Rusha C. Smith, Esquire
Bradley, Arant, Rose & White, L.L.P.
One Federal Place
1819 5th Avenue North
Birmingham, Alabama 35203-2104

James R. Miller, Esquire
Dickie, McCamey & Chilcote
Two PPG Place, Suite 400
Pittsburg, Pennsylvania 15222-5402

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE, Plaintiff, vs. ASHLAND INC,; BP AMOCO CHEMICAL COMPANY, INC; BP AMOCO CORPORATION; CHEVRON CHEMICAL COMPANY; EXXON MOBIL CORPORATION; et al., Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. CV-2001-423

NARRATIVE SUMMARY OF UNDISPUTED MATERIAL FACTS AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, SUCCESSOR IN INTEREST TO CHEVRON CHEMICAL COMPANY, LLC, AND EXXON MOBIL CORPORATION

This is a product liability case. Plaintiff, who suffers from acute myelogenous leukemia, contends that his disease is the product, in whole or in part, of his exposures to benzene in the workplace between 1979 and 1987. Plaintiff did not file his Complaint raising these exposure-related injury claims until April 6, 2001. Under the circumstances, plaintiff's claims against these defendants are barred as a matter of law by the applicable statutes of limitations. Moreover, his warranty claim fails to state a claim for relief permitted under Alabama law. Defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in

interest to Chevron Chemical Company, LLC, and Exxon Mobile Corporation submit this narrative summary and brief in support of their Motion for Summary Judgment.

* * *

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Under Alabama law, a product liability claim arising out of exposure to chemicals must be filed within two years after the last such exposure, or within four years of the tender of delivery of the chemicals. Here, plaintiff brought suit against these defendants **twelve years** after his last claimed exposure to any benzene product supplied by any of them, **six years** after his last possible exposure to any chemicals in the workplace, and **fourteen years** after latest possible tender of delivery of the chemical to which he claims to have been exposed. As discussed below, plaintiff's claims against these defendants are therefore barred as a matter of law.

* * *

CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment of defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation is due to be granted as a matter of law.

Respectfully submitted,

/s/ George M. Walker
GEORGE M. WALKER

HAND ARENDALL, L.L.C.
3000 AmSouth Bank Building
Post Office Box 123
Mobile, Alabama 36601
Phone: (251) 432-5511
Fax: (251) 694-6375

TRACY R. DAVIS
HAND ARENDALL, L.L.C.
900 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203
Phone: (205) 324-4400
Fax: (205) 322-1163

LOUIS C. WOOLF
M. DENISE MORETZ
Attorneys for Defendants
Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation

WOOLF, MCLANE, BRIGHT,
ALLEN & CARPENTER
Post Office Box 900
Knoxville, Tennessee 37901-0900
Phone: (865) 215-1000
Fax: (865) 215-1015

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, August 26, 2002, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by

United States mail, properly addressed and first class postage prepaid.

/s/ George M. Walker

COUNSEL OF RECORD:

Mark L. Rowe, Esquire
Environmental Attorneys Group, L.L.C.
Homewood Executive Center, Suite 107
1900 28th Avenue South
Birmingham, Alabama 35209

Richard E. Davis, Esquire
Cabaniss, Johnston
Post Office Box 830612
Birmingham, Alabama 35283-0612

E. Martin Bloom, Esquire
Friedman, Leak & Bloom, P.C.
3800 Colonnade Parkway, Suite 650
Birmingham, Alabama 35243

Rusha C. Smith, Esquire
Bradley, Arant, Rose & White, L.L.P.
One Federal Place
1819 5th Avenue North
Birmingham, Alabama 35203-2104

James R. Miller, Esquire
Dickie, McCamey & Chilcote
Two PPG Place, Suite 400
Pittsburg, Pennsylvania 15222-5402

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. CV 01-423
ASHLAND, INC., et al., Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS ASHLAND'S, CHEVRON'S, AND EXXON'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff in the above-styled cause, by and through counsel, and responds to these Defendants' Motion for Summary Judgment as follows:

1. That there are genuine issues of material fact so as to preclude a judgment as a matter of law.

2. This response is based on the attached Memorandum of Law, all of the pleadings to date, all discovery and responses filed to date, the deposition testimony of Jack Cline, and chemical analysis of defendant Thompson & Formby's product, Thompson's Water Seal.

/s/ Mark Rowe
Mark L. Rowe, State Court ID No. ROW003
Environmental Attorneys Group, L.L.C.
1900 28th Avenue South
Birmingham, Alabama 35209
Telephone: 205-326-1000
Facsimile: 205-326-1007

ATTORNEYS FOR THE PLAINTIFF

Of Counsel
Dan Reynolds
510 North 18th Street
Bessemer, AL 35020
205-425-7001

Oral Argument Not Requested
Unless So Desired by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this the 7 day of October, 2002, served the above and foregoing *Plaintiff's Response to Defendants Ashland's, Chevron's, and Exxon's Motion for Summary Judgment* upon counsel of record on the attached service list by placing a true and correct copy thereof into the U.S. Mail, first class postage prepaid.

/s/ Mark Rowe
Of Counsel

**IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION**

JACK CLINE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. CV 01-423
ASHLAND, INC., et al., Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

I. Discussion of Facts

Plaintiff, Jack Cline, suffers with a form of cancer known as acute myelogenous leukemia; it is often fatal and almost uniquely caused by exposure to benzene. "Clinical reports and epidemiologic studies have repeatedly linked benzene exposure with leukemia, primarily *acute myelogytic* and other types of acute non-lymphocytic leukemia."[1] (italics added).

Without question Cline was exposed to benzene manufactured by these defendants. They are satisfied their benzene product(s) would have been used by Cline, thereby exposing him and seek no issue concerning the identification and use of their benzene products. They state as "an undisputed material fact" that: "He got the

[1] S.N. Yin, et al., A Retrospective Cohort Study of Leukemia and Other Cancers in Benzene Workers. *Environmental Health Perspectives* Vol. 82, 1989. 207.

benzene from 55 gallon barrels, and he specifically remembers using benzene from barrels bearing labels from Ashland, Mobil, Chevron, and Amoco."[2] We agree with this undisputed material fact.

More troubling is the defendants' oft-repeated statement that Cline "has not been exposed to benzene since 1987." Jack Cline has been exposed to benzene and benzene-related derivatives beginning in 1969 continually so into 1999. To claim otherwise ignores Cline's testimony, who thoroughly described his exposure to not only these defendants' benzene, but to another defendant in this case, Thompson & Formby's product as well; Thompson's Water Seal. Cline not only discussed the defendants at issue here, but discussed the history of his continual exposure to benzene from Thompson's Water Seal manufactured by defendant Thompson & Formby.

Q: (by Mr. Miller): Mr. Cline, when do your first recall using Thompson's Water Seal?

A: Well, it was probably around 1969.

Q: And you used it periodically when you were doing work up until when? 1998?

A: '99, the first part of '99 and all before I came down with my cancer.

Thompson's Water Seal contains benzene and benzene derivatives. This significant evidence should not be

---

[2] Defendants' brief at 3.

omitted and any claim of exposure that is different is certainly not an "undisputed fact."[3]

II. Plaintiff Cline Filed His Claim Within Two Years of His Last Exposure to Benzene.

Defendants' argument merely recites the general rule that a suit must be brought within two years of the last date of exposure to a harmful substance. They cite three cases for that proposition, each of which are consistent and supportive of the plaintiff in this case. Each case is considered.

A. Garrett v. Raytheon Co., 368 So.2d 516 (Ala. 1979).

The *Garrett* plaintiff, Gary Garrett, claimed exposure to radiation from radar equipment manufactured by one and only one defendant for a period of two years from 1955 to 1957. He did not allege any continuing exposure to radiation beyond those dates. It is the continuing nature of exposure that differs here from *Garrett.* Garrett brought his lawsuit more than 20 years after his last exposure to radiation, unlike Cline, who brings his suit within two years after his last exposure to benzene. Jack Cline's last exposure to benzene was in 1999, consistent with the holding in *Garrett.* The language in *Garrett* that suggests a statute of limitations "began to run when plaintiff was

---

[3] Defendants' brief at 3. While worded only slightly different, defendants' brief is replete with this allegation. Jack Cline deposition testimony taken July 9, 2002, at 60. Chemical analysis of Thompson's Water Seal showing high parts per million amounts of benzene and benzene-related derivatives is attached to this Memorandum.

last exposed to radiation" might as easily say that Cline's statute "began to run when [he] was last exposed to "*benzene*". The *Garrett* decision hardly justifies a judgment for these defendants as a matter of law against Jack Cline.

B. Becton v. Rhone-Poulenc, Inc., 706 So.2d 1134 Ala. 1997.

Similarly, there is little comfort for these defendants in the *Becton* decision. There, the plaintiff was exposed to an admitted teratogen, which the defendants here correctly point out is in the same chemical family as benzene, demonstrating the potent carcinogenic reach of benzene and its derivatives. Despite this defendant's characterization to the contrary, this is the only "strikingly similar fact" to Cline's benzene exposure. Beyond that, the case is quite dissimilar.[4]

Becton's last exposure to a benzene-related chemical was almost nine (9) years before he filed suit; plaintiff Jack Cline's last exposure to benzene itself was within two years of his lawsuit. Most importantly, in *Becton,* plaintiff's response to the statute of limitations defense was to assert that a discovery statute was "federally mandated" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Court then entered into a lengthy discussion of federalism in relationship to CERCLA. We make no such claim here. Alabama, to state perhaps overly generally, follows the last date of exposure rule and we do not argue otherwise.

---

[4] Defendants' brief at footnote 6 at 7; defendants' brief at 7. Similar carcinogenic chemicals in the same chemical family, is the only "strikingly similar fact" between *Becton* and *Cline*.

The only relevant language found in *Becton* simply restates the general rule on the last date of exposure. For purposes of an action based on continuous exposure to a hazardous substance, the date of the injury is the date on which plaintiff was last exposed to the hazardous substance causing the injury." *Becton* at 706. Here the "hazardous substance causing the injury" is benzene, to which Jack Cline was exposed last within two years of filing his claim. We are consistent with the broad rule outlined in *Becton* and assuredly do not argue that CERCLA federally mandates a discovery rule. The *Becton* decision offers no succor to these defendants for the harsh result they seek.

C. **Hillis v. Rentokil, Inc.**, 596 So.2d 888, Ala. 1992.

Equally unrelated is the *Hillis* decision. It is curious that the defendant in *Hillis* actually argued that Alabama should adopt a discovery rule for statute of limitations purposes, because Hillis was aware of his injuries earlier than his last date of exposure. The defendant here strenuously argues, as did the plaintiff in *Hillis,* that it is the last date of exposure rather than a discovery rule that governs the statute of limitations. Plaintiff Hillis filed his complaint, as has Cline, within the last two years of his exposure. It is difficult to understand how the *Hillis* decision helps the defendants here.

It is clear that Cline filed his lawsuit within two years of his last date of exposure to benzene and is consistent with all of the cases cited by these defendants.

III. There is No Different Statute of Limitations for This Defendant.

So clearly has Cline filed his suit within two years of his last exposure that it is difficult to discern how this defendant would justify escaping liability with what they have presented to the Court. While never argued directly, there is an oblique reference by this defendant that hints at perhaps their true argument. They mention in passing that Cline failed to file a claim within two years of his exposure "to any benzene that may have been supplied by these defendants."[5]

If indeed this be their true argument, they should say so in a fully cited and reasoned brief rather than some glancing throw-away line at the end of a largely irrelevant brief. Their reluctance to do so must necessarily stem from the realization that such a conclusion is not only counter-initiative but also not the law in Alabama.

All the defendants in this case are concurrent tortfeasors, and as such are equally liable for the entire injury suffered by Jack Cline. In other words, they are all equally liable for the one injury that the plaintiff sustained. This is the conclusion found in the *Garrett* decision. *Garrett* explained that the "date of injury" for statute of limitations purposes is the "day on which the plaintiff was last exposed to the damages which injured her." *Garrett* at 520. Therefore, in a case involving a continuing exposure, such as a benzene exposure case, the actions cannot accrue under the last date of exposure statute of limitations as long as the person is still being exposed to the "hazardous substance." The Court clearly reasoned in *Garrett* that the

---

[5] Defendant's brief at 9.

date of injury for statute of limitations purposes is the day on which the plaintiff was last exposed. Until that date, the plaintiff does not have an injury for which the statute of limitations would begin to run.

Thus, the statute of limitations could not begin to run on any claims against some of the defendants or any of their concurrent tortfeasors until every action which contributed to Cline's injury had occurred. Accepting the defendants' apparent argument would lead to the astounding conclusion that a different statute of limitations would apply to concurrent tortfeasors who together caused one injury through a continuing tort simply based on the last date of exposure to that particular defendant's product. That reasoning could have the potential effect of forcing a minor defendant whose product exposed the plaintiff much later being held responsible for the plaintiff's entire injury. That is not the law in Alabama, and none of the cases cited by this defendant have reached that conclusion.

Consistent with the law in Alabama, plaintiff Jack Cline filed his lawsuit within two years from the date of his last exposure to these concurrent tortfeasors' benzene. These defendants' Motion for Summary Judgment based on the statute of limitations on the plaintiff's AMELD claim is due to be denied.

/s/ Mark Rowe
Mark L. Rowe, State Court ID No. ROW003
Environmental Attorneys Group, L.L.C.
1900 28th Avenue South
Birmingham, Alabama 35209
Telephone: 205-326-1000
Facsimile: 205-326-1007

ATTORNEYS FOR THE PLAINTIFF

Of Counsel
Dan Reynolds
510 North 18th Street
Bessemer, AL 35020
205-425-7001

Oral Argument Not Requested
Unless So Desired by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this the 7 day of October, 2002, served the above and foregoing *Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment* upon counsel of record on the attached service list by placing a true and correct copy thereof into the U.S. Mail, first class postage prepaid.

/s/ Mark Rowe
Of Counsel

CV 2001 00423.00
JUDGE: DAN C. KING III

ALABAMA JUDICIAL DATA CENTER
CASE ACTION SUMMARY CONTINUATION
CIRCUIT CIVIL

IN THE CIRCUIT COURT OF JEFF-BESMR COUNTY

JACK CLINE VS ASHLAND INC., ET AL
FILED: 04/06/2001 TYPE: PRODUCTS LIABILITY
TYPE TRIAL: JURY TRACK:

* *

DATE 1: CA: CA DATE:
DATE 2: AMT: $00 PAYMENT:

* *

* * *

1/14/03 Motion for Summary Judgment on Behalf of Defendants Ashland, Inc, Chevron Phillips Chemical LP Successor in Interest of Chevron Chemical Company LLC and Exxon Mobil Company is denied. Holmes Oil Company motion for summary judgment is denied. The Breach of Warranty counts in the complaint are granted by agreement of the parties and are dismissed.

This case is set Sept. 8, 2003 #4

/s/ Dan C. King III Judge

1/29/03 attys notified via fax (ls)

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE, Plaintiff, vs. ASHLAND, INC,; BP AMOCO CHEMICAL COMPANY, INC; BP AMOCO CORPORATION; CHEVRON CHEMICAL COMPANY; EXXON MOBIL CORPORATION; et al., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. CV-2001-423 **ORAL ARGUMENT REQUESTED**

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, SUCCESSOR IN INTEREST TO CHEVRON CHEMICAL COMPANY, LLC, AND EXXON MOBIL CORPORATION

Defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation, move the Court, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, for entry of an order granting summary judgment in their favor on each and every claim made against them by plaintiff. In support of this motion, defendants aver that there is no material issue of disputed fact, and that they are entitled to summary judgment as a matter of law for any or all of the following reasons:

1. Plaintiff's claims against these defendants are barred by the applicable statutes of limitation.

2. Plaintiff cannot demonstrate by substantial evidence that he experienced any substantial exposure to benzene.

3. Plaintiff cannot establish by substantial evidence that he was exposed to any benzene produced or supplied by any of these defendants.

4. Plaintiff cannot establish by substantial evidence that any of these defendants supplied benzene that was in a defective or unreasonably dangerous condition.

5. Plaintiff cannot produce substantial evidence that low level exposures to benzene of the type he allegedly experienced are associated with the production of acute myelogenous leukemia in humans.

6. Plaintiff cannot produce substantial evidence that his disease, to any degree of medical certainty, most probably resulted from exposures to benzene.

This motion is based upon the pleadings, the narrative summary of undisputed facts and brief in support of motion for summary judgment filed contemporaneously herewith, and the evidentiary submission in support of motion for summary judgment also filed contemporaneously herewith.

WHEREFORE, defendants request that the Court enter an order granting summary judgment in their favor.

/s/ George M. Walker
GEORGE M. WALKER

HAND ARENDALL, L.L.C.
3000 AmSouth Bank Building
Post Office Box 123
Mobile, Alabama 36601
Phone: (251) 432-5511
Fax: (251) 694-6375

TRACY R. DAVIS
HAND ARENDALL, L.L.C.
900 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203
Phone: (205) 324-4400
Fax: (205) 322-1163

LOUIS C. WOOLF
M. DENISE MORETZ
Attorneys for Defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation

WOOLF, MCLANE, BRIGHT,
ALLEN & CARPENTER
Post Office Box 900
Knoxville, Tennessee 37901-0900
Phone: (865) 215-1000
Fax: (865) 215-1015

Defendants respectfully request oral argument on their motion

/s/ George M. Walker

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, January 8, 2004, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ George M. Walker

COUNSEL OF RECORD:

Mark L. Rowe, Esquire
Environmental Attorneys Group, L.L.C.
Homewood Executive Center, Suite 107
1900 28th Avenue South
Birmingham, Alabama 35209

Richard E. Davis, Esquire
Cabaniss, Johnston
Post Office Box 830612
Birmingham, Alabama 35283-0612

E. Martin Bloom, Esquire
Friedman, Leak & Bloom, P.C.
3800 Colonnade Parkway, Suite 650
Birmingham, Alabama 35243

Rusha C. Smith, Esquire
Bradley, Arant, Rose & White, L.L.P.
One Federal Place
1819 5th Avenue North
Birmingham, Alabama 35203-2104

James R. Miller, Esquire
Dickie, McCamey & Chilcote
Two PPG Place, Suite 400
Pittsburg, Pennsylvania 15222-5402

IN THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE, Plaintiff, v. ASHLAND, INC., et al., Defendants.	)	CIVIL ACTION NO. CV 01-423

PLAINTIFF'S REPLY BRIEF IN OPPOSITION TO DEFENDANTS ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, SUCCESSOR IN INTEREST TO CHEVRON CHEMICAL COMPANY, LLC, EXXONMOBIL CORPORATION, AND BP AMOCO CHEMICAL COMPANY, SUCCESSOR IN INTEREST TO AMOCO CORPORATION AND STANDARD OIL COMPANY, SHERWIN WILLIAMS COMPANY AND HOLMES OIL COMPANY'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff, Jack Edward Cline, by and through its counsel and, pursuant to Rule 56(b) of the Alabama Rules of Civil Procedure, seeks denial of the summary judgment motion filed by Defendants where there are genuine issues of material facts and these Defendants are not entitled to judgment as a matter of law.

NARRATIVE SUMMARY OF UNDISPUTED FACTS AS READ AND INTERPRETED BY THE PLAINTIFF

The Plaintiff, Jack Edward Cline, filed suit against the named Defendants as manufacturers, suppliers, and/or

distributors of benzene and/or benzene-containing products after he was diagnosed with Acute Myelogenous Leukemia ("AML"). This condition is unequivocally known to be caused by benzene. Mr. Cline's AML developed after several years of exposure to defendant's benzene where these products were delivered and used by Mr. Cline and his coworkers as a cleaning solvent at Griffin Wheel, a wheel manufacturing facility located in Bessemer, Alabama. Mr. Cline's exposure to benzene began approximately in 1968 when the Griffin facility began to utilize a chemical analysis device called a "spectrometer." ("Exh. I", Plaintiff's dep. p. 88, lines 1-23). This exposure to benzene at Griffin lasted through 1986 or 1987 when his job responsibilities began to change. ("Exh. 2," Plaintiff's dep. p. 89 lines 8-23). However, his exposure to benzene continued for several years after leaving Griffin Wheel.

Mr. Cline also the used of Thompson's Water-seal, a chemical used as a water-proofing agent for wood and other similar materials. Thompson's Water-seal is a trademark name owned by The Sherwin-Williams Company, also a defendant party in this lawsuit. Mr. Cline believes that his AML was also caused by this product since this product was used in his business and for personal applications around his home. Thompson's Water-seal, through chemical analysis, has been shown to contain benzene and other petroleum-based constituents likely to induce cancer as well. ("Exh. 3," analysis report). Mr. Cline used this product from the early 1970's through late 1999 on several construction projects and continued to use this product just prior to his discovery of his AML, the condition that lead him to file this lawsuit.

PLAINTIFF CAN DEMONSTRATE GENUINE ISSUES OF MATERIAL FACTS

Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the burden of showing that there is no issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). In support of their motion for summary judgment, defendants address five issues in support of their motion. However, there are essentially three realistically before the court:

Issue I

Whether Jack Cline's claims against these defendants are barred by the applicable statues of limitation;

Issue II

Whether Jack Cline can demonstrate by substantial evidence that he experienced any substantial exposure to benzene to cause his condition, Acute Myelogenous Leukemia ("AML"); and

Issue III

Whether Jack Cline can establish by substantial evidence that he was exposed to benzene supplied by the named Defendants that was in a defective or unreasonably dangerous condition.

With the exception of issue I, "Yes" is essentially the answer to all issues raised by the Defendants. However,

for the purpose of offering evidence to support denial of this motion, all responses are addressed accordingly.

I. THIS COURT HAS ALREADY RULED IN FAVOR OF THE PLAINTIFF WHERE THE DEFENDANT ALLEGED NON-COMPLIANCE WITH ALABAMA'S TWO-YEARS-FROM-LAST-EXPOSURE RULE

This court has already addressed this issue. The Defendants claim was denied before and nothing is presented here bring into disrepute the decision already granted by this very court. Reconsidering this issue yet again amounts to collateral estoppel. Denial again is in order.

* * *

IV. ALL SUMMARY JUDGMENT MOTIONS ARE DUE TO BE DENIED

The principles of law applicable to a motion for summary judgment are well settled. To grant such a motion, the trial court must determine that the evidence does not raise a genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala.R.Civ.P. When the movant makes a prima facie showing that those two conditions are satisfied, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. *Bass v. SouthTrust Bank of Baldwin County,* 538 So.2d 794, 797-98 (Ala. 1989). Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida,* 547 So.2d 870, 871 (Ala. 1989). The evidence

submitted in support of these claims made by Jack Cline against these Defendants are more than significant to encourage this court to deny this motion and allow a jury to determine the rights of Mr. Cline, who continues to battle this chemically-induced condition.

/s/ Gregory A. Cade
Gregory A. Cade,
State Court ID No. CAD010
Mark L Rowe,
State Court ID No. ROW003
2120 16th Avenue South,
Suite 100
Birmingham, Alabama 35205
Telephone: 205-212-9995
Facsimile: 205-212-9996

ATTORNEYS FOR THE PLAINTIFF

Of Counsel
Dan Reynolds
510 North 18th Street
Bessemer, AL 35020
205-425-7001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this the 21st day of June, 2004, served the above and foregoing *Plaintiff's Reply Brief in Opposition to Defendants Ashland, Inc., Chevron Phillips Chemical LP, Successor in Interest to Chevron Chemical Company, LLC, Exxonmobil Corporation, and BP Amoco Chemical Company, Successor in Interest to Amoco Corporation and Standard Oil Company, Sherwin Williams Company and Holmes Oil Company's Motion for Summary Judgment* upon counsel of record on

the attached service list by placing a true and correct copy thereof into the U.S. Mail, first class postage prepaid.

/s/ Gregory A. Cade
Of Counsel

NOTICE OF APPEAL TO THE
(Check appropriate block)

☒ **SUPREME COURT OF ALABAMA**
☐ **COURT OF CIVIL APPEALS OF ALABAMA**

State of Alabama **Unified Judicial System** **Form ARAP-1 (front) Rev. 1/97**	**Civil Action Number:** CV-01-423

IN THE CIRCUIT COURT OF JEFFERSON, BESSEMER DIV. **COUNTY, ALABAMA**

APPELLANT JACK CLINE
v. APPELLEE ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, EXXON MOBILE CORP.
TRIAL JUDGE DAN C. KING, III

DATE OF JUDGMENT:	**DATE OF POST-JUDGMENT ORDER:** 3-8-05

NOTICE IS HEREBY GIVEN THAT JACK CLINE appeal(s) to the above-named court from the ☐ Final Judgment ☒ Order On Motion for Summary Judgment (describing it) entered in this cause.

CHECK THE PROPER DESCRIPTION OF THE APPEALED CASE UNDER THE APPROPRIATE COURT:

SUPREME COURT

1. ☒ Summary Judgment, amount claimed more than $50,000
2. ☐ Judgment Amount exceeds $50,000
3. ☐ Amount Sought in trial court more than $50,000, judgment for defendant
4. ☐ Equitable Relief, except for domestic relations
5. ☐ Other: _____

COURT OF CIVIL APPEALS

1. ☐ Summary Judgment, amount claimed $50,000 or less
2. ☐ Judgment Amount $50,000 or less
3. ☐ Amount Sought $50,000 or less, judgment for defendant
4. ☐ Workman's Compensation
5. ☐ Domestic Relations
6. ☐ Other: _____

APPELLANT FILES WITH THIS NOTICE OF APPEAL:

1. ☒ Security for costs of appeal
2. ☐ A supersedeas bond in the amount of $ _____
3. ☐ Deposited cash security in the amount of $ _____
4. ☑ Is exempted by law from giving security for costs of appeal by virtue of ___ _____

Filed 4-15-05 (Date)

2120-16th Ave. So. Ste. 100, Birmingham (Address)
AL 35205 205-212-9995
Telephone Number

CERTIFIED AS A TRUE COPY

/s/ Earl N. Carter, J.
Circuit Clerk

/s/ Mark A. Rowe
Appellant or Attorney for Appellant

SECURITY FOR COSTS

We hereby acknowledge ourselves security for costs of appeal. For the payment of all costs secured by this undertaking, we hereby waive our right of exemption as to personal property under the Constitution and laws of the State of Alabama.

Executed with our seals this 15th day of April, 2005.

Filed and approved:
4-19-05 (Date)

/s/ Jack Cline by Mark Rowe Mark Rowe (L.S.)
Appellant-principal

/s/ Mark Rowe (L.S.)
Surety

/s/ Earl N. Carter, J.
Circuit Clerk
(Amended November 9, 1976; October 1, 1991.)

(L.S.)
Surety

SUPERSEDEAS BOND

We, the undersigned principal and sureties, hereby acknowledge ourselves bound unto _____ in the sum of _____ Dollars, for the payment of which we bind ourselves, and each other, our heirs, executors, [(for amount of bond see Rule 8(a))] and administrators, jointly and severally, and as part of this undertaking we hereby waive our rights of exemption as to personal property under the Constitution and laws of the State of Alabama.

WHEREAS, the above-named appellee(s) recovered a judgment against appellant(s) for the sum of _____ Dollars (and the further acts or duty ____ _____) and [describing judgment in addition to or other than for

money only] _____ Dollars, the costs in that behalf expended.

NOW, therefore, the condition of the foregoing obligation is such that, if the appellant shall prosecute this appeal to effect, and satisfy such judgment, penalties, and costs, including costs of appeal as may be rendered in this case, then the said obligation to be null and void, otherwise to remain in full force and effect.

Executed with our seals this _____ day of _____, _____.

Filed and approved:

_____ (Date)

_____ (L.S.)
Appellant-Principal

_____ (L.S.)
Surety

_____
Circuit Clerk

_____ (L.S.)
Surety

EXECUTION OF JUDGMENT STAYED:

Bond fixed at: $ _____
(Not required for money judgment only.)

_____ _____
Circuit Judge

DESIGNATION OF RECORD ON APPEAL

DESIGNATION OF CLERK'S RECORD: Appellant requests the clerk of include the following checked materials in the clerk's record:

1. ☒ Complaint 2 ☒ Answer 3. ☐ Courterclaim 4. ☐ Cross-Claim 5. ☐ Third-party Complaint 6. ☐ Third-party Answer 7. ☐ Motion to dismiss 8. ☐ Pretrial order	9. ☒ Entire record (less those items set forth in Rule 10(a)) 10. ☒ Motion for summary judgment 11. ☒ Opposition to motion for summary judgment 12. ☒ Final (Judgment) (Order) 13. ☐ Motion for New Trial 14. ☒ Ruling on Motion 15. ☐ Others: _____ 16. ☐ Exhibit Number: _____

TRANSCRIPT STATUS

☒ Transcript will not be ordered. [See Rule 10(b), ARAP.]

☐ Transcript will be ordered. [See Rules 10(b)(2) and 11(a)(2), ARAP, Form 1A or 1B.] Court reporter(s):

_____

_____

_____

NOTE: If more than one court reporter was involved in this case, you must file a Transcript Purchase Order Form in compliance with Rules 10(b) and 11(c), Form 1A or 1B of the ARAP, for *each* court reporter.
(Amended October 1, 1991.)

CERTIFICATE OF FILING

I certify that I have this date filed with the clerk of the trial court the original and 4 copies of the foregoing notice of appeal (along with $100 docket fee), and such other instruments as have been completed and included herein. A true copy of each of these items will be served by the clerk of the trial court on each of the following:

1) Clerk of the appellate court, (the $100 docket fee shall be transmitted with this filing).

2) Court Reporter.

3) Counsel for appellee, or appellee if no counsel.

   Name: Mark Rowe, 2120-16th Ave. So. Ste. 100, Birmingham, AL 35205

   Address: _____

DATED this 15th day of April, 2005.

/s/ Mark Rowe
Attorney for Appellant

(Amended October 1, 1991.)

DOCKETING STATEMENT
Appeal to the Supreme Court of Alabama

NOTE: Completed Civil Case Cover Sheet must be attached.

State of Alabama Unified Judicial System **Form ARAP-24 (front) Rev. 1/97**	**Supreme Court Case Number:** *(To be filled in by Supreme Court)*

COUNTY	**CIVIL ACTION NUMBER**	**TRIAL JUDGE**
Jefferson Bessermer Div.	CV-01-423	Dan C. King, III

I. PARTY/PARTIES FILING APPEAL (Appellant): Jack Cline

APPELLANT'S ATTORNEY: Mark Rowe, Gregory Cade
(205) 212-9995
Telephone Number

2120-16th Ave. So. Ste 100, Birmingham AL 35205
Address *City* *State* *Zip Code*

II. PARTY/PARTIES APPEALED AGAINST (Appellee): Ashland, Inc., Chevron Phillips Chemical, LP, Exxon Mobile Corp.

APPELLEE'S ATTORNEY: George M. Walker
(251) 432-5511
Telephone Number

3000 AMS South Bank Bldg, Mobile, AL 36601
Address *City* *State* *Zip Code*

III. APPELLANT IS THE TRIAL COURT:
☒ Plaintiff ☐ Defendant ☐ Other

IV. IS THIS A CROSS-APPEAL? ☐ Yes ☒ No

V. RELIEF AWARDED/REQUESTED:
Please check the appropriate block(s):

A. X Monetary damages were either sought or awarded, as set out below:

1. Compensatory damages were:
   (a) ☐ awarded in the amount of $ _____;
   (b) ☐ not awarded, but sought in the amount of $ _____;
   (c) ☐ sought, but not awarded – the amount sought was not specified in the complaint.

2. Punitive damages were:
   (a) ☐ awarded in the amount of $ _____;
   (b) ☐ not awarded, but sought in the amount of $ _____;
   (c) ☐ sought, but not awarded – the amount sought was not specified in the complaint.

3. A general award of damages (not differentiating between compensatory and punitive) was:
   (a) ☐ made in the amount of $ _____;
   (b) ☐ not made, but sought in the amount of $ _____;
   (c) ☒ sought, but not made – the amount sought was not specified in the complaint.

4. Other monetary damages (*Type*: _____ _____) were:

   (a) ☐ awarded in the amount of $ _____;
   (b) ☐ not awarded, but sought in the amount of $ _____;
   (c) ☐ sought, but not awarded – the amount sought was not specified in the complaint.

5. Was there a remittitur or additur at issue in the trial court? ☐ Yes ☐ No
   (*If yes, please provide the details in the "FACTS" section on the back of this form.*)

B. ___ Equitable and/or declaratory relief was sought in the trial court.

C. ___ Other
(*Please provide the details of the issue(s) before the Court in the "ISSUES" section on the back of this form.*)

VI. TYPE OF JUDGMENT OR ORDER APPEALED. (Please check one):

A ☐ Judgment based on a Jury Verdict
B ☐ Judgment based on a Non-Jury Decision
C ☐ Judgment Notwithstanding the Verdict (JNOV)
D ☐ Order granting a New Trial
E ☐ Judgment as a Matter of Law
F ☒ Summary Judgment
G ☐ Dismissal
H ☐ Default Judgment
I ☐ Other

VII. IF THIS CASE WENT TO TRAIL, HOW MANY DAYS DID THE TRIAL TAKE? _____

VIII. FINALITY OF JUDGMENT: Date of entry of judgment or order appealed from: 3 (Month) 08 (Day) 05 (Year)

1. Is the judgment or order appealed from in compliance with Rule 58, A.R.Civ.P.?	☒ Yes	☐ No
2. Does the order appealed from constitute a disposition of all claims as to all parties?	☒ Yes	☐ No
3. If not, did the trial court enter an order intended to make the order final pursuant to Rule 54(b)?	☐ Yes	☒ No
4. If the trial court intended to make the order appealed from final pursuant to rule 54(b), did the court in the Rule 54(b) order expressly determine that there was no just reason for delay and expressly direct that final judgment be entered?	☐ Yes	☒ No

5. If the answer to question 2 is "NO," and the trial court did not make the order final by full compliance with Rule 54(b), please explain the basis for seeking appellate review and cite the authority for this appeal:

_____

_____

IX. POST-JUDGMENT MOTIONS: List all post-judgment motions by date of filing, type, and date of disposition (whether by trial court order or by the provisions of Rule 59 1, A.R.Civ.P.):

DATE OF FILING			TYPE OF POST-JUDGMENT MOTION	DATE OF DISPOSITION		
Month	Day	Year		Month	Day	Year
			NONE			

X. CONSTITUTIONAL ISSUES:

1. Are the provisions of Rule 44, A.R.App.P., applicable to this appeal? ☐ Yes ☒ No
2. If so, have the provisions been complied with? ☐ Yes ☐ No

XI. NATURE OF CASE ON APPEAL: In the left column of boxes preceding the categories listed below, check the box (*check only one*) that best describes or categorizes the basis or theory of the primary issue on appeal. In the right column of boxes, check any secondary theories that are applicable to the suit.

TORTS:

01 ☐☐ Bad Faith
02 ☐☐ Fraud
03 ☐☐ Legal Malpractice
04 ☐☐ Medical Malpractice
05 ☐☐ Other Malpractice
06 ☒☐ Products/AEMLD

07 ☐☐ Negligence (Vehicular)
08 ☐☒ Negligence (General/Other)
09 ☐☐ Personal Property
10 ☐☐ Real Property
11 ☐☐ Wrongful Death (All Types)
12 ☐☒ Wantonness
13 ☐☐ Conversion
14 ☐☐ Wrongful Employ. Termination
15 ☐☐ Premises Liability
16 ☐☐ Outrage
29 ☐☐ Other: _____

CONTRACTS:

30 ☐☐ Commercial
31 ☐☐ Personal
32 ☐☐ Pension
33 ☐☐ Insurance
34 ☐☐ Employment
39 ☐☐ Other: _____

OTHER:

40 ☐☐ Real Property
41 ☐☐ Civil Rights (Prisoner)
42 ☐☐ Civil Rights (Other)
43 ☐☐ Wills/Trusts/Estates
44 ☐☐ Declaratory Judgment
45 ☐☐ Injunction (Commercial)
46 ☐☐ Injunction (Employment)
47 ☐☐ Injunction (Other)
48 ☐☐ Extraordinary Writ
49 ☐☐ Pub. Service Comm
50 ☐☐ RR/Seaman (FELA)

51 ☐☐ RICO

99 ☐☐ Other: _____

XII. **APPELLATE REVIEW:** Please take notice that your case may be initially reviewed by the Court of Civil Appeals. Pursuant to § 12-2-7, *Code of Alabama* 1975, the Supreme Court has the authority to transfer any civil case within its jurisdiction to the Court of Civil Appeals, except cases presenting a substantial question of federal or state constitutional law; cases involving a novel legal question, the resolution of which will have significant statewide impact; utility rate cases appealed pursuant to § 37-1-140, *Code of Alabama 1975*; bond validation cases appealed pursuant to § 6-6-754, *Code of Alabama 1975*; or Alabama State Bar disciplinary proceedings.

If you believe this case should not be transferred to the Court of Civil Appeals, please state with specificity the reason(s) why it should ***not*** be transferred, referring to pertinent sections of § 12-2-7. Reasons should be supported in the ISSUES and FACTS sections of this docketing statement.

_____

_____

_____

XIII. **ISSUES:** Briefly summarize the issue(s) on appeal.

In an AEMLD Personal Injury Action for injury caused by exposure to a toxic substance, does the Statute of Limitations accrue against all joint tortfeasors upon the plaintiff's last exposure to the toxic substance?

XIV. FACTS: Without argument, briefly summarize the facts to inform the court of the nature of the case.

The plaintiff/appellant developed acute myelogenous leukemia ("AML") as a proximate result of his continuous exposure to benzene over the course of many years, including exposure to pure benzene manufactured and/or supplied by the defendants/appellees, Ashland, Inc., Chevron Phillips Chemical LP, and Exxon Mobil Corp. The plaintiff/appellant's exposure to benzene manufactured and/or supplied by the defendants/appellees occurred while he was employed as a plant chemist for Griffin Wheel Co. in Bessemer from about 1968 through about 1987. However, from the 1970's through about 2000, the plaintiff/appellant was also exposed to benzene contained in a product known as "Thompson's Water Seal," which was manufactured and/or supplied by Thompson & Formby Co., a former defendant in the case. In 2001 the plaintiff/appellant was first diagnosed with AML and in the same year filed this AEMLD personal injury action against the defendants/appellees and others, including former defendant Thompson & Formby Co.

April 15, 05 /s/ Mark Rowe

Date **Signature of Attorney/ Party Filing this Form**